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**D I G E S T**  
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**DECISIONS**  
**IN**  
**THE SUPREME COURT**  
**OF**  
**THE UNITED STATES.**

**FROM THE ORIGIN OF THE COURT TO THE CLOSE OF THE  
DECEMBER TERM, 1854.**

**By B. R. CURTIS,**  
**ONE OF THE ASSOCIATE JUSTICES OF THE COURT.**

**FIFTH EDITION,**  
**REVISED WITH REFERENCE TO THE LATEST DECISIONS.**

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## ABANDONMENT.

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## ABATEMENT.

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## ABSENT DEFENDANT.

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## ACCOMPLICE.

EVIDENCE, E. 3.

## ACCORD AND SATISFACTION.

1. The debtor, who agrees to pay a less sum in discharge of a contract for a greater, must pay punctually; for, until performance, the creditor is, in general, not bound. *Clarke v. White*, 12 P. 178....xii. 680.

2. A creditor who has made a binding agreement with his debtor, not inequitable in itself, to accept specific articles in payment of his debt, cannot have relief in equity, without complying with his contract. *Very v. Levy*, 13 H. 345....xix. 527.

3. Such an agreement imports, *per se*, a valuable consideration. *Ib.*

4. Construction of an agreement to accept satisfaction of a judgment, held

to be conditional, and as it was not performed, the right to an execution revived. *Early v. Rogers*, 16 H. 599....xxi. 314.

5. To an action against the clerk of a court on his official bond, the breach assigned being that he took an insufficient injunction bond, a plea that the plaintiffs obtained possession of the bond, brought suit on it, and received a sum of money in satisfaction thereof, is a good bar. *Bevins v. Ramsey*, 15 H. 179....xx. 461.

## ACCOUNT.

### A. STATED AND SETTLED, 2.

### B. BILL FOR, 2.

### C. RESTS AND COMPUTATION, 3.

#### A. STATED AND SETTLED.

1. An account-current sent by a foreign merchant to a merchant in this country, and not objected to for two years, is deemed an account stated, and throws the burden of proof upon him who received and kept it without objection. *Freeland v. Heron*, 7 C. 147....ii. 490.

2. A settled account is only *prima facie* evidence, at law, of its correctness; it concludes nothing as to items not stated in it. *Perkins v. Hart*, 11 W. 237....vi. 578.

3. If a party, detained in a city, distant from his home, by inability to procure special bail, settles an account, not the subject of the suit in which bail is required, as a means of procuring his liberation, without examination of books or vouchers, and in a manner highly injurious to himself, it will not be allowed to stand, in equity. *Kelsey v. Hobby*, 16 P. 269....xiv. 290.

#### LIMITATIONS, B. 1.

### B. BILL FOR.

1. Bill to open an account settled twenty-six years before; statute of limitations pleaded; relief denied. *Stearns v. Page*, 7 H. 819....xvii. 418.

2. What averments must be made on such a bill, to induce the court to open the account. *Ib.*

3. A court of equity has not jurisdiction of a bill for an account, in which the complainant's claim is for rent, and the other side of the account consists of items for goods sold and delivered, and moneys advanced, which are not disputed, and no discovery is wanted. The remedy is at law. *Fowle v. Lawrason's Executor*, 5 P. 495....ix. 443.

4. Where parties were jointly interested in a contract with the government, and the agent for the government was secretly interested with them, and one part of their plan was to impose on its officers by false measures, the court refused to sustain a bill by one of the parties against another for an account. *Bartle v. Nutt*, 4 P. 184....ix. 45.

5. If a bill seeks to open a settled account and surcharge and falsify it, the



complainant must show clearly the errors complained of, otherwise the settlement remains a bar. *Chappedelaine v. Dechenaux*, 4 C. 306 . . . ii. 114.

6. Where a complainant has a right to an account, the court may refer the cause, either with or without instructions, as to the principles upon which it is to be taken. *Field v. Holland*, 6 C. 8 . . . ii. 303.

ASSIGNMENT OF CHOSE IN ACTION, A. 5; EXECUTORS AND ADMINISTRATORS, A. 18; LIMITATIONS, G. 11; PARTNERSHIP, B. 3.

### C. RESTS AND COMPUTATION.

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ASSUMPSIT, A. C.; CONTRACT, I.; COVENANT, A.; DEBT, C.; EJECTMENT, C. D.; PAYMENT, D.; SURVIVORSHIP.

1. A public officer is not liable to an action for an honest mistake, made in a matter where he was obliged to exercise his judgment, though an individual may suffer from his mistake. *Kendall v. Stokes*, 3 H. 87 . . . xv. 296.

2. An application by a private person for a writ of *mandamus*, proceeds upon the ground that he has no other adequate remedy; and after the *mandamus* has been awarded, the applicant cannot have an action on the case for the same cause for which the *mandamus* was granted, though he may for disobeying the *mandamus*. *Ib.*

3. An action at law by the bearer will lie on a note payable to A B or bearer for the use of an unincorporated company, of which the promisors are members. *Ronnafee v. Williams*, 3 H. 574 . . . xv. 558.

## AD DAMNUM

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A. JURISDICTION. (*Infra*, A. 2; JURISDICTION, C. 1.)

## 1. PRIZE.

1. Neither the President, nor any inferior executive officer, can establish a court of prize, competent to take jurisdiction of a case of capture *jure belli*. *Jecker v. Montgomery*, 13 H. 498....xix. 615.

2. Cases of recapture are cases of prize, to be proceeded in as such, and restoration is made absolutely, or conditionally, or refused, as each case requires. *Schooner Adeline*, 9 C. 244....iii. 350.

3. A sale, before condemnation, by one acting under the possession of the captor, does not divest the court of jurisdiction, and the condemnation relates back to the capture, affirms its legality, and establishes the title of the purchaser. *Williams v. Armroyd*, 7 C. 423....ii. 608.

CONFEDERATION, 8; CONFLICT OF LAWS, K. 1, 2; LAW OF NATIONS, B. 28.

## 2. INSTANCE. (JUDGMENTS, &c. B. 2; LAW OF NATIONS, B.)

1. If the employment of the vessel be not substantially maritime, the admiralty has not jurisdiction, though one terminus of the voyage may be on tide water. *Steamboat Orleans v. Phœbus*, 11 P. 175....xii. 391.

2. The admiralty courts of this country may take jurisdiction of a case of salvage of one foreign vessel by the officers and crew of another foreign vessel at the instance of the latter. *Mason v. Ship Blaireau*, 2 C. 240....i. 479.

3. The courts of the United States have not jurisdiction in the admiralty of a libel by the owners of a vessel against a consignee of cargo, to recover the contributory share due in general average, on account of cargo which the master has delivered to such consignee. *Cutler v. Rae*, 7 H. 729....xvii. 374.

4. It belongs to the jurisdiction of the admiralty to entertain suits to try the title to proceeds in the registry of the court. *Andrews v. Wall*, 3 H. 568....xv. 555.

5. The admiralty has no jurisdiction in matters of account between part owners. *Steamboat Orleans v. Phœbus*, 11 P. 175....xii. 391.

6. The admiralty has not jurisdiction over an account between the agent of a steamer and its owners, for moneys paid to their use. *Minturn v. Maynard*, 17 H. 477....xxi. 620.

7. There is not jurisdiction in admiralty to foreclose a mortgage of a vessel by a sale, or by transfer of the possession to the mortgagee. *Bogart v. Steamboat John Jay*, 17 H. 399....xxi. 572.

8. Material-men have a lien, which may be enforced by a proceeding in the admiralty, *in rem*, for necessaries or supplies, furnished in a port to which the vessel is foreign; and so, if she be held out as foreign, and supplies are furnished on the faith that she is so. *The St. Jago de Cuba*, 9 W. 409....vi. 110.

9. If the local law gives a lien to material-men for repairs of a domestic vessel within the ebb and flow of the tide, it may be enforced in the admiralty. *Peyroux v. Howard*, 7 P. 324....x. 506.

10. A lien for duties on goods imported cannot be enforced by a libel *in rem* in the admiralty. *United States v. Three Hundred and Fifty Chests of Tea*, 12 W. 486....vii. 302.

11. A suit *in personam* against an owner of a vessel, for supplies, cannot be maintained in the admiralty, where the owner gave a negotiable promissory note for the debt, which has not been given up or tendered at the hearing. *Ramsay v. Allegre*, 12 W. 611....vii. 395.

12. The admiralty has jurisdiction *in personam* for a tortious seizure on the sea, and may compel appearance by an attachment of goods, and of rights and

credits, in the hands of a third person, and may condemn the property attached to satisfy the claim; and it is not necessary that the property to be attached should be specified in the libel. *Manro v. Almeida*, 10 W. 473.... vi. 485.

13. This civil remedy is not merged in the offence of piracy, if the seizure was piratical. *Ib.*

14. The courts of the United States have admiralty jurisdiction as well *in personam* as *in rem*, over libels founded on contracts of affreightment to be executed on the sea between the cities of New York and Providence. *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 6 H. 344.... xvi. 722.

15. Courts of admiralty have jurisdiction of suits for pilotage, though the service and its compensation are regulated by state laws. *Hobart v. Drogan*, 10 P. 108.... xii. 34.

16. Cases of seizure upon waters navigable from the sea, by vessels of more than ten tons burden, for breach of the laws of the United States, are civil cases of admiralty and maritime jurisdiction, and are to be tried without a jury. *Whelan v. United States*, 7 C. 112.... ii. 475.

17. The district courts have admiralty jurisdiction of all seizures made on waters navigable from the sea, by vessels of ten or more tons burden. *United States v. Schooner Betsey and Charlotte*, 4 C. 443.... ii. 170.

18. An information in the district court to enforce the forfeiture of a vessel for exporting arms and ammunition contrary to the act of May 22, 1794, (1 Stats. at Large, 369,) is a civil cause of admiralty and maritime jurisdiction, and not to be tried by a jury. *United States v. La Vengeance*, 3 D. 297.... i. 230.

19. So the admiralty has jurisdiction over a question of forfeiture arising under the act of March 22, 1794, (1 Stats. at Large, 347,) prohibiting the slave-trade. *United States v. Schooner Sally*, 2 C. 406.... i. 513.

20. The district court has not admiralty jurisdiction of a suit for wages earned on a voyage upon the Missouri River, above the ebb and flow of the tide. *Steamboat Thomas Jefferson*, 10 W. 428.... vi. 465.

21. Congress had power to pass the act of February 26, 1845, (5 Stats. at Large, 726,) not as regulations of commerce, but under the provision of the constitution that the judicial power of the United States shall extend to cases of admiralty and maritime jurisdiction, and as regulations of that jurisdiction. *Propeller Genesee Chief v. Fitzhugh*, 12 H. 443.... xix. 233.

22. The admiralty jurisdiction of the courts of the United States extends to collisions on the River Mississippi above the ebb and flow of the tide. *Fretz v. Bull*, 12 H. 466.... xix. 249.

23. The admiralty jurisdiction granted to the district courts of the United States under the constitution, extends to the navigable lakes and rivers of the United States, without regard to the ebb and flow of the tides of the ocean. *Propeller Genesee Chief v. Fitzhugh*, 12 H. 443.... xix. 233.

24. A case of collision on the River Mississippi, within the ebb and flow of the tide, is within the admiralty and maritime jurisdiction of the courts of the United States, though also *infra corpus comitatus*. *Waring v. Clarke*, 5 H. 441.... xvi. 456.

25. The exclusive cognizance of prize questions belongs in general to the capturing power, and the courts of other countries will not undertake to redress alleged marine torts, committed by public armed vessels, in assertion of belligerent rights. *L'Invincible*, 1 W. 238 . . . .iii. 532.

26. This applies to privateers duly commissioned. *Ib.*

27. But our courts of admiralty will take jurisdiction, to inquire if the alleged wrongdoer is duly commissioned, or has, by the use of our territory, to increase his force, trespassed on our neutral rights. *Ib.*

28. The right of adjudicating on all questions of prize, exclusively belongs to the courts of the captor's country ; but, it is an exception to the general rule, that where the captured vessel is brought, or voluntarily comes, *infra præsidia* of a neutral power, that power has a right to inquire whether its own neutrality has been violated by the capture ; and, if so, it is bound to restore the property. *The Estrella*, 4 W. 298 . . . .iv. 406.

29. In cases of violation of our neutrality by any of the belligerents, if the prize comes voluntarily within our territory, it is restored to the original owners by our courts. *La Amistad de Rues*, 5 W. 385 . . . .iv. 673.

30. But their jurisdiction for this purpose, under the law of nations, extends only to restitution of the specific property, with costs and expenses, during the pendency of the suit, and does not extend to the infliction of vindictive damages or compensation for plunderage, as in ordinary cases of marine torts. *Ib.*

31. Where the original owner seeks for restitution in our courts upon the ground of a violation of our neutrality by the captors, the *onus probandi* rests upon him, and if there be reasonable doubt respecting the facts, the court will decline to exercise its jurisdiction. *Ib.*

32. In the absence of any act of congress on the subject, the courts of the United States would have authority, under the general law of nations, to decree restitution of property captured in violation of their neutrality. *The Estrella*, 4 W. 298 . . . .iv. 406.

CAPTURE, E. 3 ; SALVAGE, A. 7 ; SHIPPING, A. 10, 11, C. 1 ; TERRITORIES OF THE UNITED STATES, 3.

## B. PLEADING.

### 1. LIBEL AND INFORMATION, AND HEREIN OF PARTIES.

1. The mode of proceeding by libel in prize causes is so general in all civilized maritime countries, that a failure to produce evidence of one is a cause of grave suspicion. *La Nereyda*, 8 W. 108 . . . .v. 374.

2. The pleadings in the admiralty must contain at least some general allegation of the necessary facts, to enable the court to proceed. *The Divina Pastora*, 4 W. 52 . . . .iv. 345.

3. A libel for a forfeiture must be particular and certain in all the material circumstances which constitute the offence. *Brig Caroline v. United States*, 7 C. 496 . . . .ii. 641.

4. A statement of the offence, with that substantial certainty demanded by our free institutions, must be required in every court where justice is the object, and is not rendered unnecessary by a reference to the penal statute and a

general allegation that it was violated. *Schooner Hoppet v. United States*, 7 C. 389 . . . ii. 585.

5. A libel, by the United States, in the admiralty, to procure a forfeiture, is an information. The same technical nicety is not required as in indictments at common law; it is sufficient if the offence be described in the words of the law, and so set forth that, if the allegations be true, the offence must be within the statute. *The Samuel*, 1 W. 9 . . . iii. 447.

6. In general, a libel *in rem* for a forfeiture, which alleges the offence in the words of the statute, is sufficient. *The Palmyra*, 12 W. 1 . . . vii. 1.

7. If an information in the admiralty clearly set forth an offence within the statute, it is sufficient, though it does not conclude *contra formam statuti*. *The Merino, The Constitution, The Louisa*, 9 W. 391 . . . vi. 102.

8. A count describing an offence in the words of one statute, but alleging it to be an offence against another and different statute, is bad in substance. *Ib.*

9. It is usually sufficient to charge an offence for which a forfeiture is inflicted, in the words of the statute; but where those words are so general as to describe a whole class of individuals, while the intention of the legislature was to inflict a forfeiture only on a subdivision of that class, the charge must be conformed to the actual meaning of the legislature. *The Mary Ann*, 8 W. 380 . . . v. 452.

10. According to the course of decisions in this court, an exception contained in a proviso is a matter of defence, and need not be negatived in a libel of information. *Two Hundred Chests of Tea*, 9 W. 430 . . . vi. 121.

11. If one act inflict a forfeiture, and a subsequent act provides that it shall not be inflicted if the property belonged to a citizen, it is not necessary to aver in the libel that the ownership was not in a citizen; it is matter of defence. *Brig Aurora v. United States*, 7 C. 382 . . . ii. 588.

12. A libel of information under the 67th section of the collection act of March 2, 1799, (1 Stats. at Large, 677,) following the language of the enacting clause of the act, is sufficient. *Two Hundred Chests of Tea*, 9 W. 430 . . . vi. 121.

13. An information under the slave-trade acts of March 22, 1794, (1 Stats. at Large, 347,) and of March 2, 1807, (2 Stats. at Large, 426,) is sufficient if it pursues the words of the law, and the charge may be stated in the alternative, if each alternative constitutes an offence which is a cause of forfeiture. *The Emily and The Caroline*, 9 W. 381 . . . vi. 98.

14. It is not necessary that the vessel should be completely fitted for sea, but only so far as to show the purpose for which she was intended to be sent to sea. *Ib.*

15. If an act inflict a forfeiture of a vessel for importation therein of certain articles, laden on board with intent to be imported into the United States, and with the knowledge of the master or owner of the vessel, this intent and knowledge are substantive parts of the offence, and must be averred in a libel of information in the admiralty. *Schooner Hoppel v. United States*, 7 C. 389 . . . ii. 585.

16. In a libel *in rem*, under the acts of March 3, 1819, and May 15, 1820, (3 Stats. at Large, 510, 600,) for piratical aggressions, it is not necessary to

allege or prove a conviction of the person for the criminal offence. *The Palmyra*, 12 W. 1....vii. 1.

17. Libel for a forfeiture of goods imported, and alleged to have been invoiced at a less sum than the actual cost at the place of exportation, with design to evade the duties contrary to the 66th section of the collection law, (1 Stats. at Large, 677.) Restitution decreed upon the evidence as to the cost of the goods at the place where they were last shipped; the form of the libel excluding all inquiry as to their cost at the place where they were originally shipped, and as to continuity of voyage. *United States v. One Hundred and Fifty Crates of Earthenware*, 3 W. 232....iv. 206.

18. A libel of information being found insufficient to support a decree, but the evidence strongly tending to prove a breach of the law, the case was remanded, with directions to allow an amendment. *The Mary Ann*, 8 W. 380....v. 452.

19. The agent of absent owners, may libel in his own name, as agent, or in the name of his principals. *Houseman v. Cargo of the Schooner North Carolina*, 15 P. 40....xiv. 15.

20. Though the owner of a boat and cargo, destroyed by a collision, has received, from the underwriter on the cargo, the amount of a part of his loss, he may maintain a libel, and it is not fatal to his suit that the libel states it to be in behalf of the underwriter. *Fretz v. Bull*, 12 H. 466....xix. 249.

21. If the respondent makes satisfaction to the injured party, he cannot be compelled to answer again to a merely equitable owner of the claim, who must protect his own rights by intervening in the cause, either before a decree, and becoming *dominus litis*, or after the decree, while the money is in the registry. *Propeller Monticello v. Mollison*, 17 H. 152....xxi. 428.

CONFEDERATION, 5; JURISDICTION, F. 17; SHIPPING, A. 7, 8.

## 2. ANSWER.

*Supra*, B. 1; SALVAGE, A. 6.

## 3. OTHER PLEADINGS.

1. A plea in the admiralty by one partner, in behalf of himself and his copartners, the rejoinder being signed by a proctor for all the defendants, amounts to a legal appearance of all the defendants. *Hills v. Ross*, 3 D. 331....i. 247.

2. A claim having been admitted, the prosecutor must file an exceptive allegation, if the proceeding be in the admiralty, or a plea in abatement, if it be by an information at law, in order to put in issue the claimants' right to appear. *United States v. Four Hundred and Twenty-two Casks of Wine*, 1 P. 547....vii. 691.

## C. PRACTICE. (APPEAL.)

### a. INSTANCE CAUSES.

#### 1. ABATEMENT AND REVIVOR.

CONFEDERATION, 4.



## 2. PROCESS AND APPEARANCE. (*Supra*, A. 2, B. 3.)

An appearance and claim in the admiralty, waives objections to the regularity of the process to enforce appearance. *The Merino*, *The Constitution*, *The Louisa*, 9 W. 891....vi. 102.

## 3. AMENDMENTS. (*Supra*, B. 1; PRACTICE, I. E. 2.)

1. A libel may be amended after reversal, for want of substantial averments. *Schooner Anne v. United States*, 7 C. 570....ii. 673.

2. The circuit court may, upon appeal, allow the introduction of a new allegation into an information, in admiralty, by way of amendment. *The Edward*, 1 W. 261....iii. 540. *The Marianna Flora*, 11 W. 1....vi. 497.

3. Informal and imperfect proceedings in the district court corrected and explained in the circuit court. *The Freundschaft*, 3 W. 14....iv. 154.

4. An amendment in an appellate court cannot introduce a new subject of litigation. *Houseman v. Cargo of the Schooner North Carolina*, 15 P. 40....xiv. 15.

## 4. CLAIMS AND STIPULATIONS.

1. A stipulation for property subject to admiralty process, is a mere substitute for the thing itself, and the rights of the stipulators are subject to the same powers as might be exercised by the court over the property, if still in its custody. *The Palmyra*, 12 W 1....vii. 1.

2. They cannot prevent the reinstatement of a cause, though the court may not wholly disregard their interests. *Ib.*

3. The valuation of property in a stipulation is binding in the appellate court. It is a substitute for the property. *Houseman v. Cargo of Schooner North Carolina*, 15 P. 40....xiv. 15.

4. If a claimant receives the vessel, upon a stipulation to pay into court its appraised value, with interest and costs, he cannot insist on allowances because he has discharged liens for seamen's wages; and if much delay has intervened, of which he has had the benefit, he must pay interest. *The Virgin*, 8 P. 538....xi. 208.

## 5. CUSTODY OF PROPERTY AND ITS PROCEEDS; SALES, PAYMENTS, AND RESTITUTION.

1. It is a great irregularity for the marshal to keep the property or the proceeds thereof in his own hands, or to distribute the same among the parties entitled, without a special order from the court; but such an irregularity may be waived by the assent and ratification of all the parties interested, if there be no *mala fides*. *The Collector*, 6 W. 194....v. 58.

2. War having been declared between the United States and Great Britain, after the act of salvage was performed, that part of the proceeds of the property saved, which belonged to British subjects, was ordered to be deposited, subject to the future order of the court. *The Adventure*, 8 C. 221....iii. 100.

3. The court may, in its discretion, refuse to restore property to a claimant, if the evidence at the hearing shows he ought not to receive it, though no forfeiture be decreed. *United States v. Four Hundred and Twenty-two Casks of Wine*, 1 P. 547 . . . . vii. 691.

## SALES, B. 5.

## 6. EXECUTION OF DECREES.

Where an agent has appeared in the admiralty, and claimed in behalf of his principal, and has received the property upon a stipulation, it is not regular to issue an execution against the principal, until after a monition to him to show cause. *The Gran Para*, 10 W. 497 . . . . vi. 493.

## b. PRIZE CAUSES.

## 1. CUSTODY AND SALES OF PROPERTY AND ITS PROCEEDS.

1. A vessel libelled as prize, is in the custody of the law, and under the control of the court. *Jennings v. Carson*, 4 C. 2 . . . . ii. 2.

2. A prize court, in which proceedings were instituted, has power to order a sale, even after an appeal. *Ib.*

3. Where a decree, condemning a vessel as prize, also ordered a sale, and an appeal was taken, though it was irregular to sell on that decree, this irregularity will not render the captors liable to pay the amount of the sales, which did not come into their hands, but were under the control of the court. *Ib.*

## 2. AMENDMENTS.

*Supra*, B. 1, C. a. 3; PRACTICE, I. E. 2.

3. CLAIM, NON-CLAIM; TEST AFFIDAVIT; RIGHTS AND POWERS OF CLAIMANTS. (*Supra*, B. 1; CAPTURE, H.)

1. The holder of a bottomry bond cannot claim in a prize cause. *The Mary*, 9 C. 126 . . . . iii. 292.

2. The forfeiture of property to the government, precludes the owner from making a claim in a prize proceeding, though no steps have been taken to enforce the forfeiture. *The Venus*, 8 C. 253 . . . . iii. 116.

3. If the national character of property, captured and brought in for adjudication, appears ambiguous or neutral, and no claim is interposed, the cause is postponed for a year and a day after the prize proceedings are commenced; and if no claimant appears within that time, the property is condemned to the captors. *The Harrison*, 1 W. 298 . . . . iii. 559.

4. The test affidavit should state that the property, at the time of shipment and capture, did belong, and, if restored, will belong to the claimant. *Schooner Adeline*, 9 C. 244 . . . . iii. 350.

5. If the principal is without the country, or at a great distance from the court, the claim and affidavit may be made by an agent. *Ib.*

6. The claimants have no right to litigate the question whether the captors were duly commissioned; the claimants have no legal standing to assert the rights of the United States. *The Dos Hermanos*, 2 W. 76....iv. 31.

#### 4. FURTHER PROOF.

1. It is the practice of this court, in prize causes, to hear the cause, in the first instance, upon the evidence transmitted from the circuit court, and to decide upon that evidence whether it is proper to allow further proof. *The London Packet*, 2 W. 371....iv. 138.

2. If the court below deny an order for further proof when it ought to be granted, or allow it when it ought to be denied, and the objection is taken by the party, and appears on the record, the appellate court can administer the proper relief. *The Pizarro*, 2 W. 227....iv. 91.

3. But, if evidence in the nature of further proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent, and the irregularity is waived. *Ib.*

4. A bill of lading, consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence to entitle the claimant to restitution; but is sufficient to lay a foundation for the introduction of further proof. *The Freundschaft*, 3 W. 14....iv. 154.

5. The fact of invoices and letters of advice not being found on board, may induce a suspicion that papers have been spoliated. But even if it were proved that an enemy-master carrying a cargo chiefly hostile, had thrown papers overboard, a neutral claimant, to whom no fraud is imputable, ought not thereby to be precluded from further proof. *Ib.*

6. Where the affidavits produced on the order for further proof are positive, but their credibility impaired by the non-production of letters mentioned in the affidavits, a second order for further proof will be allowed in the appellate court. *The Frances*, 8 C. 348....iii. 167.

7. Where it did not distinctly appear whether enough had been done to amount to a capture, an order for further proof was made. *The Grotius*, 8 C. 456....iii. 219.

8. Further proof directed, the national character not distinctly appearing. *Schooner Adeline and Cargo*, 9 C. 244....iii. 350.

9. Further proof ordered. *The Frances*, 8 C. 354....iii. 172; *The Mary*, 8 C. 388....iii. 186; *The Venus*, 1 W. 112....iii. 484.

10. Further proof ordered, open to both parties. *The Fortuna*, 2 W. 161....iv. 68.

11. A question of proprietary interest and concealment of papers. Further proof ordered, open to both parties. On the production of further proof by the claimant, condemnation pronounced. *The Fortuna*, 3 W. 236....iv. 208.

12. A question of proprietary interest, on further proof. Restitution decreed. *The Venus*, 5 W. 127....iv. 588.

13. A question of proprietary interest on further proof. Condemnation pronounced. *The Atalanta*, 5 W. 433....iv. 695.

14. A question of proprietary interest. Further proof ordered. *The Atlanta*, 3 W. 409 . . . iv. 241.

15. Parties who have had the benefit of plenary proof in the court below, cannot have an order for further proof here, except under very special circumstances. *The Dos Hermanos*, 2 W. 76 . . . iv. 31.

16. It is not a matter of course to make an order for further proof in this court, in a prize cause ; and such order will not be made, when there is reason to believe the applicant has suppressed important documentary evidence, but the court will proceed to condemnation. *The St. Lawrence*, 8 C. 434 . . . iii. 210.

17. *Aliter*, where the documents not produced in the court below are shown here in support of the application, and they appear to support the applicant's title, and there is no reason to suppose they were kept back unfairly. *Ib.*

18. It is a relaxation of the rules of the prize court, to allow time for further proof in a case where there has been concealment of material papers. *The Fortuna*, 3 W. 236 . . . iv. 208.

19. If the parties have been guilty of gross fraud, or misconduct, or illegality, further proof is not allowed, and condemnation follows. *The Dos Hermanos*, 2 W. 76 . . . iv. 31.

20. Further proof, by the claimant, inconsistent with that already in the case, refused. *The Euphrates*, 8 C. 385 . . . iii. 183.

21. Time for further proof refused. *Cargo of Ship Hazard v. Campbell*, 9 C. 205 . . . iii. 334.

22. Goods appearing by the ship's papers to be a consignment from alien enemies to American merchants, condemned *in toto* as prize, although further proof was offered that American merchants were jointly interested, and that they had a lien upon the goods, in consequence of advances made by them. *The Frances*, 8 C. 385 . . . iii. 163.

23. Further proof on these points refused. *Ib.*

24. The captors are competent witnesses upon an order for further proof, where the benefit of it is extended to both parties. *The Anne*, 3 W. 435 . . . iv. 253.

25. Depositions taken on further proof, in one prize cause, cannot be invoked into another. *The Experiment*, 4 W. 84 . . . iv. 352.

26. Affidavits to be used as further proof in causes of admiralty and maritime jurisdiction in this court, must be taken under a commission. *The London Packet*, 2 W. 371 . . . iv. 138.

27. Where an order for further proof is made, and a party neglects to comply with it, courts of prize are in the habit of considering such negligence as fatal to his claim. *La Nereyda*, 8 W. 108 . . . v. 374.

28. An alleged purchaser under a decree of condemnation, not having produced a copy of the proceedings, after an order for further proof, and his whole conduct being inconsistent with his asserted proprietary interest, his claim was rejected. *Ib.*

29. On the production of further proof, if the neutrality of the property is not established beyond reasonable doubt, condemnation follows. *The Amiable Isabella*, 6 W. 1 . . . v. 1.

## 5. PROOFS.

1. In prize causes, the evidence to acquit, or condemn, must come, in the first instance, from the papers and crew of the captured ship. *The Dos Hermanos*, 2 W. 76....iv. 31. *The Pizarro*, 2 W. 227....iv. 91. *The Amiable Isabella*, 6 W. 1....v. 1.

2. It is the duty of the captors to bring the ship's papers into the registry of the district court, verify them on oath, and to have the examinations of the principal officers and seamen of the captured ship taken on the standing interrogatories, and not *viva voce*. *Ib. ib. ib.*

3. It is exclusively upon these papers and examinations that the cause is to be heard in the first instance: If, from this evidence, the property clearly appears to be hostile or neutral, condemnation or restitution immediately follows: If the property appears to be doubtful, or the case suspicious, further proof may be granted according to the rules which govern the legal discretion of the court, if the claimant has not forfeited his right to it by a breach of good faith. *Ib. ib. ib.*

4. In general, the circumstance of goods being found on board an enemy's ship, raises a legal presumption that they are enemy's property. *The London Packet*, 5 W. 132....iv. 589.

5. By the rules of the prize court, the *onus probandi* of a neutral interest rests on the claimant. *The Amiable Isabella*, 6 W. 1....v. 1.

6. In a prize cause, the claimant of cargo is not precluded by a sentence, condemning the vessel as enemies' property, for want of a claim, from showing in the same cause, that the vessel, in fact, was American property, and her owner, without any fault of the claimant of the cargo, has neglected to interpose a claim. *The Mary*, 9 C. 126....iii. 292.

## D. EVIDENCE AND PROOFS IN INSTANCE CAUSES.

1. In a prosecution against a vessel, for violation of a law of the United States, it is not necessary to adduce positive testimony of the identity of the vessel. It is sufficient if the circumstances fully satisfy the judicial mind, of the fact charged. *Schooner Jane v. United States*, 7 C. 363....ii. 570.

2. This court will grant a commission to take new evidence to be used here, in a case of admiralty jurisdiction. *Hawthorne v. United States*, 7 C. 107....ii. 471.

3. A witness offered to be examined, *viva voce*, in open court, in an instance cause, ordered to be examined out of court. *The Samuel*, 3 W. 77....iv. 174.

## E. DAMAGES. (CAPTURE, H.; COLLISION, B.)

1. Where there is probable ground for a suit or defence *in rem*, in the admiralty, the successful party is not entitled to damages, only to costs and expenses. *Canter v. American Insurance Company*, 3 P. 307....viii. 427.

2. The probable profits of a voyage, either upon the cargo or freight, do not form an item for the computation of damages, in cases of marine torts. *The Apollon*, 9 W. 362....vi. 88.

3. Where the property is restored, after a detention, demurrage is allowed

for the detention of the ship, and interest upon the value of the cargo, under a libel for a tortious seizure. *Ib.*

4. Where the vessel and cargo have been sold, the gross amount of the sales, with interest, is allowed; and an addition of 10 per cent. sometimes made, where the property has been sold under disadvantageous circumstances. *Ib.*

5. Counsel fees may be allowed, either as damages or costs, both on the instance and prize side of the court. *Ib.*

6. Counsel fees not allowed as part of the damages. *Arcambel v. Wiseman*, 3 D. 306....i. 234.

7. If a prize is sold by agreement, and the money stopped in the hands of the marshal, by a third person, not a party to the agreement, increased damages are not allowed, but only interest on the debt. *Jennings v. Brig Perseverance*, 3 D. 336....i. 251.

8. Damages having been assessed in a gross sum by commissioners, without any specification of items, that part of the decree was reversed, though the report of the commissioners was not excepted to in the court below. *Murray v. Schooner Charming Betsey*, 2 C. 64....i. 450.

#### F. COSTS AND EXPENSES. (CAPTURE, H.)

The matter of costs in the admiralty are not, *per se*, the subject of an appeal; and as they are in the sound discretion of the court, an appellate court should not, ordinarily, interfere with that discretion. *Harmony v. United States*, 2 H. 210....xv. 91.

*Supra*, E. 1, 5; APPEAL, A. 1.

### ADVERSE POSSESSION.

#### SEISIN AND DISSEISIN; PRESUMPTIONS.

### AGENT.

#### CORPORATIONS, F.; FACTOR; POWERS.

#### A. AUTHORITY, 16.

1. EXERCISE AND EXTENT OF.
2. RATIFICATION.
3. REVOCATION AND EXHAUSTION OF.

#### B. EXECUTION OF AUTHORITY, 18.

1. PUBLIC ACTS.
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#### C. DUTY OF AGENT TO PRINCIPAL, 18.

1. DILIGENCE AND FIDELITY.
2. ACCOUNTING AND PAYING.
3. NOT TO DEAL WITH PRINCIPAL.
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D. RIGHTS OF PRINCIPAL AGAINST THIRD PERSONS, 19.

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F. RIGHTS OF AGENT AGAINST PRINCIPAL, 19.

G. RIGHTS OF AGENT AGAINST THIRD PERSONS, 19.

H. RIGHTS OF THIRD PERSONS AGAINST PRINCIPAL, 19.

I. RIGHTS OF THIRD PERSONS AGAINST AGENT, 19.

#### A. AUTHORITY.

##### 1. EXERCISE AND EXTENT OF. (PRACTICE, II. G. 3.)

1. A witness may be asked whether he was agent for the plaintiff before any evidence of the manner of creating his agency. *Conard v. Atlantic Insurance Company of New York*, 1 P. 386....vii. 637.

2. The United States are not bound by the declarations of their agent, founded upon a mistake of fact, unless it clearly appear that the agent was acting within the scope of his authority, and was empowered in his capacity of agent to make such declaration. *Lee v. Munroe*, 7 C. 366....ii. 572.

3. If the owner of a bill send it to an agent, not residing at the place where it is payable, for collection, the agent has an implied authority to employ a sub-agent at that place; and if the sub-agent receive the contents, the owner can sue him for money had and received, though the sub-agent had no notice when he collected the money, that the agent was not the owner. *Wilson v. Smith*, 3 H. 763....xv. 635.

4. And in such a case, the sub-agent cannot retain part of the proceeds, on account of a debt of the agent, unless he has given credit on the faith that the agent owned the bill. *Ib.*

5. An agent to collect debts, merely, is not a factor. *Hopkirk v. Bell*, 3 C. 454....i. 640.

6. If a merchant abroad send a letter of instructions to a merchant here, by the hand of a person named in the letter, which declares the bearer to be the agent of the writer, and the bearer of his orders, and refers to him for verbal communications, the merchant here has a right to act upon the belief, that such agent has discretionary authority to authorize a departure from the terms of the letter, in an emergency which was probably not foreseen. *Manella v. Barry*, 3 C. 415....i. 624.

7. Where an agent was authorized to make advances on consignments to the extent of two thirds the invoice price, and draw on his principal therefor, it was held that the authority did not extend to consignments made by himself. *Schimmelpennich v. Bayard*, 1 P. 264....vii. 560.

8. An authority to draw on Taber and Son, Portland, or me, at New York, does not authorize bills on Taber and Son, payable in New York. *Lanusse v. Barker*, 3 W. 101....iv. 180.

9. But the drawing of such bills does not preclude the agent from afterwards drawing on the defendant in New York, in execution of the other alternative authority. *Ib.*



10. An agent being authorized to buy property for his principal, and pay for it by funds raised by drawing bills, cannot make his principal debtor to the vendor for the price of the goods. *Parsons v. Armor*, 3 P. 418....viii. 467.

11. If the principal instructs his agent to purchase, and pay out of funds in his hands, and the vendor has notice of this instruction, and the agent draws on the principal in favor of the vendor in payment for the goods, the principal is not bound to accept, and the vendor cannot charge him for the price. *Ib.*

12. An authority to an agent to sell property does not empower him to depart from the law in making the title, and if he does so, and the title fails for that cause, the principal is not liable to refund the purchase-money. *Owings v. Hull*, 9 P. 607....xi. 497.

13. A power to an agent to sell lands, on such terms in all respects as he might deem most advantageous, and to execute deeds of conveyance necessary for the full and perfect transfer of the title, authorizes the agent to insert in the deed the usual covenants of warranty. *Le Roy v. Beard*, 8 H. 451....xvii. 654.

14. If a power be ambiguous, and is reasonably construed by the agent and a third person dealing with him, the principal is bound, though it should prove not to have been the construction intended by the principal. *Ib.*

15. If a clause in a power of attorney relate only to the particular mode in which an authority was to be executed, and its language is ambiguous, but, with reasonable attention would bear the interpretation upon which the agent and a third person have acted, the principal is bound. *Very v. Levy*, 13 H. 345....xix. 527.

#### POWERS, 5.

#### 2. RATIFICATION.

1. If an agent who has departed from instructions, does not make his principal aware of the fact of departure, the principal cannot be supposed to intend to ratify. *Bell v. Cunningham*, 3 P. 69....viii. 289.

2. If a consignor, through his agent abroad, accept and sell a cargo purchased in breach of orders, this may or may not amount to a ratification. *Ib.*

3. If the consignor's agent accepted and sold the cargo in pursuance of directions given, in ignorance of a breach of orders, it is not a ratification. *Ib.*

#### 3. REVOCATION AND EXHAUSTION OF.

1. When an authority has been once given to a merchant abroad, and has been acted on in good faith, implied revocations are not favored; it is incumbent on the principal to show a revocation in terms too clear to be charged with equivocation. *Lanusse v. Barker*, 8 W. 101....iv. 180.

2. A naked power *inter vivos* to convey property not coupled with an interest, though irrevocable by the donor of the power, by reason of a contract not to revoke it, necessarily ceases at his death. *Hunt v. Rousmanier's Administrators*, 8 W. 174....v. 379.

3. By the phrase "coupled with an interest," is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate. *Ib.*

## B. EXECUTION OF AUTHORITY.

1. PUBLIC ACTS. (*Infra*, I.)

1. The acts of agents do not derive their validity from professing on the face of them to have been done in the exercise of their agency. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 W. 326....iv. 648.

2. The liability of the principal depends upon the facts, 1. That the act was done in the exercise, and, 2. Within the limits of the power delegated. *Ib.*

3. In ascertaining these facts, as connected with the execution of any written instrument, parol testimony is admissible. *Ib.*

4. Where the mode of payment of premiums had not been prescribed to an agent, he could agree to accept the check of the insured, drawn against funds in bank. *Tayloe v. Merchants' Fire Ins. Co.* 9 H. 390....xviii. 191.

## 2. PRIVATE ACTS. (DEED, A. 4-6.)

## C. DUTY OF AGENT TO PRINCIPAL.

## 1. DILIGENCE AND FIDELITY.

An agent who discovered a defect in the title of his principal, and made use of his information to acquire a valid legal title for himself, was held to be a trustee for his principal. *Ringo v. Binns*, 10 P. 269....xii. 115.

## 2. ACCOUNTING AND PAYING.

*Supra*, A. 1; *Infra*, E. 2; F. I. 3.

## 3. NOT TO DEAL WITH PRINCIPAL.

AUCTION, 2; FIDUCIARY CAPACITY.

## 4. OTHER MATTERS.

1. A factor is bound to obey the orders of his consignor, as to the time of selling, if no advances have been made, or liabilities incurred, by the factor. *Brown v. M'Gran*, 14 P. 479....xiii. 601.

2. But if the factor has made advances, or incurred liabilities on account of the goods, by which he has acquired a special property therein, he has a right to sell enough to reimburse his advances, or meet his liabilities, unless restrained by some agreement with the consignor. *Ib.*

3. Such agreement may arise from accepting the consignment accompanied by an order as to the sale. *Ib.*

4. If the consignor stands ready to repay the advances, he may control the sale. *Ib.*

5. Where consignees had been accustomed to insure the property of the consignor only when ordered to do so by letter, a promise by an agent of the con-

signees to write to them to obtain insurance, which he failed to do, does not render the consignees liable for not insuring. *Randolph v. Ware*, 3 C. 508 ....i. 650.

#### D. RIGHTS OF PRINCIPAL AGAINST THIRD PERSONS.

*Supra*, A. 1, 2.

#### E. RIGHTS OF PRINCIPAL AGAINST AGENT.

*Supra*, A. 1; PAYMENT, A. 4.

1. The holder of a bill sent to a bank for collection, is bound by the settled usage of the banks of that place, as to the time of demanding payment. A time bill need not be presented for acceptance; and an omission thus to present it, or to apprise its owner that ineffectual inquiries have been made after the drawee, or failure to protest for non-acceptance, is not negligence in a bank holding it for collection, provided the bank acted, in those particulars, according to its settled usage. *Bank of Washington v. Triplitt*, 1 P. 25 ....vii. 438.

2. A consignee, who has sold merchandise of the consignor, and received its proceeds, but who has accepted bills drawn against those proceeds, which are not yet at maturity, or are in the hands of third persons, for value, cannot be sued by the consignor for those proceeds. *Black v. Zacharie*, 3 H. 483 ....xv. 527.

BANKS, 3.

#### F. RIGHTS OF AGENT AGAINST PRINCIPAL.

1. A consignee abroad having purchased a return cargo, and consigned it to the principal, who objected to the purchase, but received and sold the cargo, an action by the consignee, for money had and received, will lie to recover the proceeds of the sales. *Willinks v. Hollingsworth*, 6 W. 240 ....v. 73.

2. In that action, the defendant cannot recoupe damages for breach of his orders. *Ib.*

ASSUMPSIT, C. 6, 7.

#### G. RIGHTS OF AGENT AGAINST THIRD PERSONS.

*Supra*, A. 1.

#### H. RIGHTS OF THIRD PERSONS AGAINST PRINCIPAL.

*Supra*, A. 1.

#### I. RIGHTS OF THIRD PERSONS AGAINST AGENT.

1. A lease to S. D., secretary of war, and his successors, containing covenants for himself and his successors, being a contract which he had authority to make in behalf of the government, does not bind S. D. personally. *Hodgson v. Dexter*, 1 C. 345 ....i. 423.

2. A bill of exchange, drawn by the consul-general of France on the public

treasury of his country, shows on its face that the contract was on account of the government, that the engagement was official and not personal, and that it is not a cause of action against the drawer. *Jones v. Le Tombe*, 3 D. 384... i. 267.

3. Whether a court of law has jurisdiction of a suit by the owners of a privateer, to recover of a public agent of the United States, in a French port, the proceeds of property captured, but not adjudicated upon, and which went into the hands of such agent, "for whom it might concern," the court was equally divided in opinion. *Bingham v. Cabbot*, 3 D. 19... i. 76.

4. But if a court of law has jurisdiction, documentary evidence, showing in what character the defendant below received the property, was admissible. *Id.*

5. An action will not lie against an agent of the Cherokee nation to recover the value of services rendered in their removal beyond the Mississippi River; he is a public agent of a people, in many respects to be considered as a nation, and his contracts, in their behalf, do not bind him personally. *Parks v. Ross*, 11 H. 362... xviii. 652.

6. An execution, having regularly issued on an erroneous judgment, was sent by one of the judgment creditors to the plaintiffs in error, to be collected for his account, with an indorsement thereon: "Use and benefit of the office of discount and deposit, U. S., Washington city, C. Neale." The plaintiffs in error received the amount, and when it was paid, the defendants in the judgment informed the agent of the plaintiffs in error they intended to appeal to the supreme court, and should expect the plaintiffs in error to refund. The judgment having been reversed.—*Held*, the plaintiffs in error were not liable for the money thus collected. *Bank of United States v. Bank of Washington*, 6 P. 8... x. 3.

BILLS, &c. G. 2; DEED, A. 5.

## ALIEN.

ALLEGIANCE; CITIZEN; DESCENT AND DISTRIBUTION; ESCHEAT.

A. WHO IS OR NOT, 20.

B. DISABILITIES, 21.

C. RIGHTS AND POWERS, 21.

### A. WHO IS OR NOT.

1. A person born in England before the year 1775, and who always resided there, and never was in the United States, is an alien, and could not, in the year 1798, take lands in Maryland by descent from a citizen of the United States. *Dawson's Lessee v. Godfrey*, 4 C. 821... ii. 122.

2. By an act of the 4th of October, 1776, the State of New Jersey asserted its right to the allegiance of all persons born, and then residing within the territory of the State, and as D. C. was there born, and continued to reside there,

until 1777, he was a citizen of the State. *M'Ilwaine v. Coxe's Lessee*, 4 C. 209 . . . .ii. 74.

3. His leaving the State afterwards, and actually adhering to the side of the crown did not render him an alien. *Ib.*

4. Nor did the treaty of peace of 1783 have that effect. *Ib.*

5. An infant, residing in the family of his father, and who went to England with him and did not return to reside here, must be deemed to have followed the condition of his father, and adhered to the crown. *Inglis v. Trustees of Sailors' Snug Harbor*, 3 P. 99 . . . .viii. 305.

6. Alienage being proved, the fact that the alien acquired real estate many years since, but did not occupy it, is not sufficient ground for presuming that he became a citizen of Virginia, by taking an oath of fidelity in a court of record. *Blight's Lessee v. Rochester*, 7 W. 535 . . . .v. 316.

#### LAW OF NATIONS, E, 18-22.

#### B. DISABILITIES.

1. Aliens are not heirs; the law casts the descent on the next heir having heritable blood, passing by the alien as if not in existence. *Orr v. Hodgson*, 4 W. 453 . . . .iv. 442.

2. British subjects born before the Revolution are incapable of inheriting or transmitting lands in this country, save by force of some treaty. *Blight's Lessee v. Rochester*, 7 W. 535 . . . .v. 316.

3. Under the Maryland act of 1791, though a person was an alien when he bid off land at auction, if he became a citizen before any title was acquired, his alien heirs do not take by descent. *Spratt v. Spratt*, 4 P. 393 . . . .ix. 111.

4. The Statute of 11 and 12 Wm. III. c. 6, which is in force in Maryland, removes the common-law disability of claiming title through an alien ancestor, but does not apply to a living alien ancestor, so as to create a title by heirship, where none would exist by the common law, if such living alien ancestor were a natural-born subject or citizen. *M'Creery's Lessee v. Somerville*, 9 W. 354 . . . .vi. 84.

5. In New York, a citizen cannot inherit collaterally from another citizen, when the former must make his pedigree through mediate alien ancestors. *Levy's Lessee v. M'Cartee*, 6 P. 102 . . . .x. 47.

*Supra*, A. 1.

#### C. RIGHTS AND POWERS.

1. An alien may take, by purchase, a freehold estate, which cannot be divested on the ground of alienage, but by inquest of office or some legislative act equivalent thereto. *Oraig v. Bradford*, 3 W. 594 . . . .iv. 305.

2. A defeasible title thus vested, during the war of the Revolution, in a British-born subject, who has never become a citizen, is completely protected and confirmed by the 9th article of the treaty of 1794, between the United States and Great Britain. *Ib.*

3. Both the treaty of peace with Great Britain of 1783, (8 Stats. at Large,

80,) and the treaty of 1794, (8 Stats. at Large, 116,) provided only for titles then existing. *Blight's Lessee v. Rochester*, 7 W. 535 . . . v. 316.

4. The property of British corporations, in this country, is protected by the 6th article of the treaty of peace of 1783, (8 Stats. at Large, 83,) in the same manner as that of natural persons ; and their title, thus protected, is confirmed by the ninth article of the treaty of 1794, (8 Stats. at Large, 122,) so that it could not be forfeited by any intermediate legislative act, or other proceeding, for the defect of alienage. *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, 8 W. 464 . . . v. 483.

5. G. C., born in the colony of New York, went to England in 1788, where he resided until his decease ; and being seised of lands in New York, he, on the 30th of November, 1776, in England, devised the same to the defendant and E. C., as tenants in common, and died so seised on the 10th of December, 1776. The defendant and E. C. having entered, and becoming possessed, E. C., on the 3d December, 1791, bargained and sold to the defendant all his interest. The defendant and E. C. were both born in England long before the Revolution. On the 22d of March, 1792, the legislature of New York passed an act to enable the defendant to purchase lands, and to hold all other lands which he might then be entitled to within the State, by purchase or descent, in fee-simple, and to sell and dispose of the same in the same manner as any natural-born citizen might do. The treaty between the United States and Great Britain, of 1794, contains the following provision : "Article 9. It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein ; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives, and that neither they nor their heirs or assigns shall, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens." The defendant, at the time of the action brought, still continued to be a British subject. *Held*, that he was entitled to hold the lands so devised to him by G. C. and transferred to him by E. C. *Jackson, ex dem. The People of the State of New York v. Clarke*, 3 W. 1 . . . iv. 153.

6. Under the law of Maryland, of December 19, 1791, which enables foreigners to take, hold, and transmit lands, a naturalized citizen is not included, but lands acquired by him, before he became a citizen, are within the act. *Spratt's Lessee v. Spratt*, 1 P. 343 . . . vii. 610.

7. The act of Kentucky of December 18, 1800, is both prospective and retrospective, and embraces aliens who after its passage shall have resided two years within the State. *Beard v. Rowan*, 9 P. 301 . . . xi. 367.

8. An alien enemy may take lands in Virginia by devise, and hold the same until office found. *Fairfax's Devisee v. Hunter's Lessee*, 7 C. 603 . . . ii. 684.

9. An alien who becomes naturalized may hold land acquired before his naturalization. *Doe, ex dem. Gouverneur's Heirs v. Robertson*, 11 W. 332 . . . vi. 614.

10. A grant by a State to an alien is not void ; he may take though he cannot hold against the State. *Ib.*

11. The laws of Virginia did not prohibit the issue of a patent to an alien. *Ib.*

12. An act of the legislature, confirming the title of the heirs of an alien, is valid as against a junior patentee ; he did not acquire a good title when the senior title escheated to the State. *Ib.*

13. An alien mortgagee may maintain a bill to have the debt paid by a sale of the land which had been conveyed to him as security therefor. *Hughes v. Edwards*, 9 W. 489 . . . .vi. 146.

14. Aliens, resident in the United States, can sue in the courts of the United States. *Breedlove v. Nicolet*, 7 P. 413 . . . .x. 527.

*Supra*, B. 4 ; CONVERSION, 2 ; ESCHEAT, 1 ; TREATIES, A. 2.

## ALLEGIANCE.

### ALIEN ; CITIZEN.

1. Though the State of New York, July 16, 1776, claimed the allegiance of all persons abiding within the State, and deriving protection from its laws, this did not embrace a person who then and always, till he left the country, resided within the British lines of the city of New York. *Inglis v. Trustees of Sailors' Snug Harbor*, 3 P. 99 . . . .viii. 305.

2. If that person ever owed any allegiance to that State, he was released from it by a bill of attainder. *Ib.*

## AMBASSADOR.

An indictment under the act of April 30, 1790, (1 Stats. at Large, 118, s. 28,) for offering violence to the person of a public minister, is not a case "affecting ambassadors, other public ministers, and consuls," within the 2d section of the 3d article of the constitution. *United States v. Ortega*, 11 W. 467 . . . .vi. 671.

## AMENDMENTS.

ADMIRALTY, C. a. 3, b. 2 ; EQUITY, C. 7 ; ERROR, H. ; PRACTICE, I. A. 4, II. D.

## ANSWER.

ADMIRALTY, B. 2 ; EQUITY, B. i.

## ANTICHRESIS.

In Louisiana, a conveyance of land, the grantee giving back at the same time an instrument declaring that on non-payment of a certain sum on a day



named, the land is to be sold, and the purchase-money applied first to pay that sum, and the residue to go to the grantor; but on payment of that sum on the day, the land is to be reconveyed, does not constitute a conditional sale, (*vente à réméré*,) but an *antichresis*, or pledge of immovables; if payment be not made, the remedy is a judicial sale; and a stipulation that, upon non-payment, the property shall belong absolutely to the grantee, is void. *Livingston's Executrix v. Story*, 11 P. 351....xii. 456.

## APPEAL.

A. WHEN AN APPEAL LIES AND IS, OR NOT, THE PROPER REMEDY, AND HEREIN OF WHAT DECREES ARE FINAL OR OTHERWISE, 24.

B. HOW AND WHEN TO BE TAKEN AND PROCEEDED WITH, AND HEREIN OF TAKING BONDS TO PROSECUTE, 26.

C. WHEN IT OPERATES AS A SUPERSEDEAS, 27.

D. BY WHOM TAKEN, 27.

E. EFFECT OF AN APPEAL, 28.

A. WHEN AN APPEAL LIES, AND IS, OR NOT, THE PROPER REMEDY, AND HEREIN OF WHAT DECREES ARE FINAL OR OTHERWISE.

PUBLIC LANDS OF THE UNITED STATES, D. d. 2; FOR AMOUNT IN DISPUTE, *see* JURISDICTION, A. d. 1.

1. No appeal lies from so much of a decree as allows expenses and costs in admiralty. Their allowance is not regulated by positive law, but by sound discretion. *Canter v. American Insurance Company*, 3 P. 307....viii. 427.

2. No appeal is given to the United States from a decree of a district judge awarding an injunction to stay a warrant of distress from the treasury, either by the act of May 15, 1820, (3 Stats. at Large, 592,) which confers the jurisdiction, or by the act of March 3, 1803, (2 Stats. at Large, 244,) regulating appeals from final judgments and decrees in district courts. *United States v. Nourse*, 6 P. 470....x. 195.

3. An appeal lies to this court to correct a mistake made by the circuit court in executing a mandate of this court. *Perkins v. Fourniquet*, 14 H. 328....xx. 201.

4. An appeal does not lie from an order overruling a motion to open a decree in equity. *Wylie v. Coxe*, 14 H. 1....xx. 1.

5. The defendant, in a suit of equity, took two grounds of defence; the circuit court decided against him on one, and dismissed the bill on the other; on appeal to this court, the decree was reversed, and the cause remanded; *held*, that the defendant could not then appeal from the decision of the circuit court

on the ground originally decided against him. *Corning v. Troy Iron and Nail Factory*, 15 H. 451....xx. 595.

6. An action at law will be dismissed if brought here by appeal instead of writ of error. *Bevins v. Ramsey*, 11 H. 185....xviii. 593.

7. The second section of the act of 1803, (2 Stats. at Large, 244,) made no change in the law respecting appeals from district to circuit courts, except by reducing the matter in controversy necessary for an appeal from \$300 to \$50. But it substitutes an appeal for a writ of error, from the circuit to the supreme court, in admiralty, prize, and equity causes. *United States v. Nourse*, 6 P. 470....x. 195.

8. Appeal dismissed, it appearing that the sum in dispute was less than \$2,000. *Sewall v. Chamberlain*, 5 H. 6....xvi. 284.

9. Any error committed by the orphans' court in allowing probate of a will must be corrected by appeal; it is not a subject for an original bill in a circuit court of the United States. *Tarver v. Tarver*, 9 P. 174....xi. 323.

10. A proceeding under a territorial law of Florida, to obtain an assignment of dower, is a proceeding at law, though not according to the forms of the common law; and an appeal is not the mode of bringing the case before this court. *Parish v. Ellis*, 16 P. 451....xiv. 376.

11. Where some of the appellants deserted an appeal after the case was entered in this court, the appeal was dismissed with costs, as to them, but retained as to another appellant, who appeared to prosecute it. *Todd v. Daniel*, 16 P. 521....xiv. 406.

12. Though a decree in equity is fully executed at the instance of the successful party, and the losing party receives money under it, this does not waive an appeal. *Erwin v. Lowry*, 7 H. 172....xvii. 76.

13. No writ of error or appeal lies to an interlocutory decree dissolving an injunction. *Young v. Grundy*, 6 C. 51....ii. 317.

14. Circuit courts should take care not to make what should be mere interlocutory decrees so operate as to be final, and compel an immediate appeal before the actual termination of the litigation in those courts. *Forgay v. Conrad*, 6 H. 201....xvi. 653.

15. Upon a bill to enjoin a judgment at law, rendered in the supreme court, a decree that the parties proceed to a new trial at law, is not final, and an appeal does not lie. *Lea v. Kelly*, 15 P. 213....xiv. 72.

16. Upon a bill in equity by residuary legatees against executors, to recover their respective proportions of the personal estate, a decree which orders a certain sum to be paid to the complainants, and directs the executors to pay into court the proceeds of debts due to the testator, when collected, is not final, and an appeal does not lie. *Young v. Smith*, 15 P. 287....xiv. 92.

17. A decree, perpetually enjoining a judgment at law, saving a sum which remained to be ascertained with precision, is not final, and an appeal does not lie from it. *Brown v. Swann*, 9 P. 1....xi. 266.

18. A decree for an injunction, in a patent cause, and a reference to a master to take an account of profits is not final, and an appeal does not lie therefrom. *Barnard v. Gibson*, 7 H. 650....xvii. 334.

19. A decree for a sale under a mortgage is such a final decree as may be appealed from. *Ray v. Law*, 3 C. 179....i. 553.

20. Where a decree decides the right to property, and directs it to be delivered up or sold, or a sum of money to be paid, and the complainant is entitled to have such decree carried into immediate execution, this is a final decree, from which an appeal lies. *Forgay v. Conrad*, 6 H. 201....xvi. 653.

21. This does not extend to mere transfers of the possession, for the purpose of securing property in litigation, such as payments into court, appointments of receivers, and the like. *Ib.*

22. A decree setting aside a deed, and ordering the property to be delivered to a commissioner of the court, who was to take an account and report all matters necessary for a final decree, is not final, and an appeal does not lie. *Pulliam v. Christian*, 6 H. 209....xvi. 659.

23. A decree, that a community of acquests and gains existed between husband and wife, and ordering an account to be taken, is not final, and an appeal does not lie. *Perkins v. Fourniquet*, 6 H. 206....xvi. 657.

24. The orphans' court in the District of Columbia having authority to allow a commission to an executor, *pro opere et labore*, its decision as to the *quantum* is final. *West v. Smith*, 8 H. 402....xvii. 636.

25. Where, on a libel for a tortious seizure, restitution with costs and damages had been decreed, but the damages had not been assessed, held that the decree was not final, and an appeal from it was dismissed. *The Palmyra*, 10 W. 502....vi. 495.

26. A decree in a suit *in personam*, declaring the libellant entitled to recover damages, and referring the matter to an assessor, is not final, and an appeal therefrom does not lie. *Ohace v. Vasquez*, 11 W. 429....vi. 651.

27. A cross-bill should be disposed of in connection with the original bill; and a decree, dismissing a cross-bill alone, is not final, and no appeal therefrom, lies. *Ayres v. Carver*, 17 H. 591....xxi. 708.

28. A decree in the admiralty is not final while the cause is pending here, and a statute, to govern the case, must be unrepealed at the time this court enters its decree. *United States v. Preston*, 3 P. 57....viii. 285.

ADMIRALTY, F.; *Infra*, C. 3, E. 1; ERROR, F. 6, 9; PRACTICE, III.

## B. HOW AND WHEN TO BE TAKEN AND PROCEEDED WITH, AND HEREIN OF TAKING BONDS TO PROSECUTE.

FOR APPEAL BONDS WHEN TAKEN, *see* BOND, E.; PRACTICE, I A. 1.

1. After an appeal has been dismissed for informality in prosecuting it, a party may have another appeal within five years from the decree. *Yeaton v. Lenox*, 8 P. 123....xi. 43.

2. A citation is not necessary, if an appeal be taken during the same term at which the final decree is made. *Reilly v. Lamar*, 2 C. 344....i. 495.

3. If an appeal be not entered at the proper term, the court will not compel the appellee's counsel to proceed at the term when it is entered. *Brown v. Swann*, 8 P. 435....xi. 151.

4. Under the act of March 3, 1803, (2 Stats. at Large, 244,) an appeal, prayed after the expiration of the term, must be proceeded with like a writ of error. *Yeaton v. Lenox*, 7 P. 220....x. 457.

5. Where the record showed that no appeal bond was taken, the appeal was dismissed, on motion. *Boyce v. Grundy*, 6 P. 777 . . . .x. 375.

6. If the court allowing the appeal accept the security to prosecute, &c., after the expiration of the time allowed by law for an appeal, it has relation back to the time of the allowance of the appeal. *The Dos Hermanos*, 10 W. 306 . . . .vi. 412.

7. An appeal bond, approved by the court, is sufficient, though signed by only part of the appellants. *Brockett v. Brockett*, 2 H. 238 . . . .xv. 107.

8. On a motion to dismiss the writ of error in this case, because the appeal bond ran to The People of the State of New York, or Frederick F. Backus, in the alternative, it was held that the bond was good, and, if forfeited, might be sued upon in the name of the people or of the relator, at the option of the government. *Spalding v. New York*, 2 H. 66 . . . .xv. 35.

### C. WHEN IT OPERATES AS A SUPERSEDEAS. (SUPERSEDEAS.)

1. A petition to open a final decree, filed and taken into consideration by the court at the same term in which the decree was made, suspends the decree, so that the ten days, allowed to supersede it by an appeal, do not begin to run till the petition is disposed of. *Brockett v. Brockett*, 2 H. 238 . . . .xv. 107.

2. An appeal does not supersede the execution of a decree of foreclosure by sale of mortgaged slaves, unless a bond to secure the whole amount of the debt is given within ten days after the date of the decree, though the property is in the hands of a receiver. *Stafford v. Union Bank of Louisiana*, 16 H. 135 . . . .xxi. 53.

3. An appeal, by a defendant in equity, having been dismissed for want of prosecution, the circuit court, on petition, allowed another appeal, and at the same time passed a decree to execute the original decree ; from this last decree the defendant also appealed. *Held*, that the circuit court had the power to proceed to execute the original decree, the second appeal therefrom not operating as a *supersedeas*, and that, consequently, the last appeal, from the decree to execute the original decree, must be dismissed. *Carr v. Hoxie*, 13 P. 460 . . . .xiii. 249.

4. A *supersedeas* of a decree in chancery can only be had by giving a bond, pursuant to the 23d section of the judiciary act of 1789, (1 Stats. at Large, 85.) *Adams v. Law*, 16 H. 144 . . . .xxi. 57.

### D. BY WHOM TAKEN.

1. A defendant in equity, whose interest is separate from that of the other defendants, may appeal without the others. *Forgay v. Conrad*, 6 H. 201 . . . .xvi. 653.

2. If a decree does not jointly affect all, but one has a several interest, he alone may appeal. If it is joint, and one only desires to appeal, notice should be given, in the circuit court, to the others, to become parties to the appeal ;

and if they neglect or refuse, the circuit court should allow the appeal of the one, and pronounce the appeal of the others deserted, and proceed to execute the decree as to them. *Todd v. Daniel*, 16 P. 521 . . . .xiv. 406.

3. Where some of the defendants, who were united in interest under a decree, did not join in an appeal, nor appear to have had notice and to have refused to join, the appeal was dismissed. *Owings v. Kincannon*, 7 P. 399 . . . .x. 520.

4. The record stating generally that an appeal was claimed and allowed, and the appeal bond, reciting that only two out of six defendants claimed and were to prosecute the appeal, the court considered this as explaining the general entry, and the appeal was dismissed. *Ib.*

5. Where an executor was removed from his trust by a decree of a competent court, on the same day on which a decree was made against him in his said capacity, in a circuit court of the United States; *held*, that neither he nor the complainant could appeal until the administrator *de bonis non*, &c., was made a party. *Taylor v. Savage*, 1 H. 282 . . . .xiv. 610.

6. Though an error was committed in carrying out the mandate of this court by a circuit court, the decree of the latter cannot be reversed on an appeal by a party not prejudiced by the error. *Campbell's Executors v. Pratt*, 2 P. 354 . . . .viii. 135.

7. Proceedings for condemnation upon captures made by public armed ships are in the name and authority of the United States, who prosecute as well for themselves as for the captors, and where damages are awarded against the latter, each have a right of appeal from that decree. *The Palmyra*, 12 W. 1 . . . .vii. 1.

#### E. EFFECT OF AN APPEAL. (EQUITY, C. 4, 5.)

1. Though this court has jurisdiction of appeals only from final decrees of the circuit courts, yet, if this court actually entertains jurisdiction and affirms the decree of a circuit court, and remands the case for further proceedings, the question whether the decree appealed from was final, cannot be raised by a second appeal from the decree of the circuit court subsequent to those further proceedings; such an appeal brings under review only the proceedings of the circuit court subsequent to the mandate. *Washington Bridge Company v. Stewart*, 3 H. 413 . . . .xv. 498.

2. After a case has been once remanded, an appeal brings up only the subsequent proceedings, but the rights growing out of and involved in those subsequent proceedings, may in part depend upon proceedings prior to the mandate, and in such a case the court must look into those prior proceedings. *The Santa Maria*, 10 W. 431 . . . .vi. 467.

3. Every existing claim which a party has omitted to make at the hearing of an admiralty cause, on the merits, before a final decree, is to be considered as waived, and cannot be brought forward on any subsequent proceedings. *Ib.*

4. When damages are claimed in the original proceeding, and only costs and expenses allowed, and no appeal from the refusal to allow damages, is taken, the claim to damages is waived. *Canter v. American Insurance Company*, 3 P. 807 . . . .viii. 427.

5. In an equity cause, the *res* in litigation may be sold by order of the circuit court, and the proceeds invested in stocks, notwithstanding the pendency of an appeal to this court. *Spring v. South Carolina Insurance Company*, 6 W. 519 . . . .v. 144.

6. In all proceedings *in rem*, on an appeal, the property follows the cause into the circuit court, and is subject to the disposition of that court. *The Collector*, 2 W. 194 . . . .v. 58.

7. But it does not follow the cause into the supreme court, on an appeal to that court. *Ib.*

8. After an appeal from the district to the circuit court, the former court can make no order respecting the property, whether it has been sold, and the proceeds paid into court, or whether it remains specifically, or its proceeds remain in the hands of the marshal. *Ib.*

9. In admiralty, an appeal suspends the sentence, and it is not *res judicata* until the final sentence of the appellate court is given. *Yeaton v. United States*, 5 C. 281 . . . .ii. 263.

10. If the law, under which a sentence of forfeiture was inflicted, expire, or be absolutely repealed, after an appeal, and before sentence by the appellate court, the sentence must be reversed. *Ib.*

11. No sentence of condemnation can be affirmed if the law under which the forfeiture accrued has expired, although a condemnation and sale had taken place, and the money had been paid over to the United States, before the expiration of the law. *Schooner Rachel v. United States*, 6 C. 329 . . . .ii. 421.

12. This court, in reversing the sentence, will not order the money to be repaid, but will award restitution of the property, as if no sale had been made. *Ib.*

CAPTURE, C. 11.

## APPEARANCE.

ADMIRALTY, C. a. 2; PRACTICE, I. A. 2; II. A. 5.

## APPOINTMENT.

CONSTITUTIONAL LAW, C. 2.

## APPURTENANCES.

DEED, F.

## ARBITRATION.

## AWARD.

## ARMY OF THE UNITED STATES.

## CONSTITUTIONAL LAW, C. 2; PAYMASTER.

1. The proviso annexed to the act of March 8, 1835, (4 Stats. at Large, 754,) prohibiting extra allowances, is confined to the appropriations made by that act. *Minis v. United States*, 15 P. 423 . . . .xiv. 132.

2. Under the 4th and 13th sections of the act of June 30, 1834, (4 Stats. at Large, 736, 738,) a military officer performing the duties of Indian agent, could be allowed only the compensation provided for in that act. *Ib.*

3. The power of the President to detach officers of the engineer corps upon civil duty, does not prevent him from allowing them reasonable compensation therefor. *Gratiot v. United States*, 15 P. 336 . . . .xiv. 106.

4. Under the army regulations of 1825, the allowance of \$2 per day to an engineer superintending the construction of a fortification, is not limited to a single allowance; if he superintends more than one work, he is entitled to more than one such allowance. *Ib.*

5. No allowance can be made for services which the officer was bound to perform, though not of ordinary occurrence. *Ib.*

6. The engineer superintending a military work is liable, by the army regulations, to be required to act in the disbursement of public money, when there is no disbursing agent for that work; a specific compensation is provided therefor; he cannot charge a commission upon such disbursements. *Gratiot v. United States*, 4 H. 80 . . . .xvi. 27.

7. Whether the plaintiff in error could be entitled to any extra compensation for extra services as chief of the corps of engineers at Washington, is a question which did not arise, because there was not evidence of the amount or value of such services. *Ib.*

8. The army regulations, made pursuant to the authority conferred by congress, have the force of law. *Ib.*

9. Under the act of March 16, 1802, (2 Stats. at Large, 132,) the adjutant and inspector-general, while stationed at the seat of government, was not entitled to additional allowances by way of double rations. *Parker v. United States*, 1 P. 293 . . . .vii. 580.

## ARREST.

1. A party indicted for a crime, who has forfeited his recognizance, is liable to be arrested to answer to the indictment. *Ex parte Milburn*, 9 P. 704 . . . xi. 537.



2. A discharge upon a *habeas corpus* does not protect the party from arrest under other process for the same offence. *Ib.*

## ARRIVAL.

PENALTIES, &c. A. 5.

## ASSETS.

Moneys received from the United States, are not local assets in the District of Columbia, but assets under the original administration. *Vaughan v Northrup*, 15 P. 1....xiv. 1.

DEBTOR AND CREDITOR, 1.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

FRAUDS AS TO CREDITORS; INSOLVENT LAWS.

1. A debtor has a legal right to prefer one creditor over another, when the transaction is *bonâ fide*, and he may elect the time of doing it, so as to make it effectual. *Tompkins v. Wheeler*, 16 P. 106....xiv. 202. And see *Brooks v. Marbury*, 11 W. 78....vi. 517.

2. A conveyance of property by a forger of notes to a trustee, for the benefit of the holders of those notes, the *cestuis que trust* not engaging or holding out any expectation that they would forego a prosecution, is valid, although the trustee knew the assignor was about to abscond, and the conveyance was made with the hope that the holders of the notes would be propitiated thereby, and would not prosecute. *Marbury v. Brooks*, 7 W. 556....v. 325.

3. The assignor having selected the assignee, and made the conveyance to him without the knowledge of the *cestuis qui trust*, he is not their agent so far as respects the inception of the transaction, and participation by him is not participation by them in the hopes and purposes of the assignor. *Ib.*

4. A deed of trust preferring certain notes forged by the grantor, is not rendered void by proof that the assignor and assignee both entertained hopes that, if the notes should be paid, prosecutions for the forgeries would not be instituted, the holders of the notes not having done any thing to encourage such expectations. *Brooks v. Marbury*, 11 W. 78....vi. 517.

5. Where the assignor himself selects the assignee, and makes the assignment to him without the knowledge of the *cestuis que trust*, the assignee is the agent of the assignor, and notice to him of circumstances accompanying the execution of the deed, is not notice to the creditors. *Ib.*

6. If the proceedings under the deed were not to be influenced by the success or failure of the hopes to escape a prosecution, those hopes did not invalidate the deed. *Ib.*

7. A deed conveying property to a trustee to be sold, and its proceeds applied to the payment of certain debts, and not imposing on the creditors any conditions, is valid to pass the property to the trustee on its execution, without the assent of the creditors. *Ib.*

8. A deed of assignment to trustees in trust for creditors, which shows upon its face an intention to postpone all payment to the creditors to a future day, and in the mean time to have the funds used to build a railroad, which, in an unfinished state, was part of the property assigned, is void on its face, as against a creditor who did not assent thereto. *Bodley v. Goodrich*, 7 H. 276....xvii. 118.

9. Assignees are liable only for funds received by them, not for promissory notes not yet payable. *Field v. United States*, 9 P. 182....xi. 327.

10. A conveyance to certain preferred creditors, in trust, for the payment of their debts, containing no conditions, may be presumed to be accepted by them. *Tompkins v. Wheeler*, 16 P. 106....xiv. 202.

## ASSIGNMENT OF CHOSSES IN ACTION.

### JURISDICTION, B. a. 4.

#### A. RIGHTS OF ASSIGNEE, AND WHAT OPERATES AS AN ASSIGNMENT, 32.

#### B. LIABILITIES OF THE ASSIGNOR AND ASSIGNEE, 34.

#### A. RIGHTS OF ASSIGNEE, AND WHAT OPERATES AS AN ASSIGNMENT.

1. Courts of law will protect the rights of an assignee of a *chose in action*; but an assignment of part of a debt is not valid unless assented to by the debtor. *Mandeville v. Welch*, 5 W. 277....iv. 626.

2. The purchaser of all the profits in a lottery from the corporation of Washington, received from the corporation, among other tickets, one which drew a prize. He presented the ticket and received its value. It afterwards appeared that while the ticket was in his possession he sold one half of it, but of this the corporation had no notice. *Held*, that though the corporation was originally liable for the prize, their contract could not be split up into parts, and they were not liable to the purchaser of the undivided half, no half ticket having been issued by them, or their authority. *Shankland v. Washington*, 5 P. 390....ix. 391.

3. Certificates of money due at the treasury of the United States, under the treaty between the United States and Mexico, (8 Stats. at Large, 526,) bearing the indorsement in blank of the payee, and acquired in good faith, and for valuable consideration, by the defendant, though not on the same footing as negotiable paper by the law merchant, are property, transferable by such

indorsement and delivery, and the defendant's title is good, as against the plaintiff, who offered no evidence to impeach it. *Baldwin v. Ely*, 9 H. 580....xviii. 273.

4. An agent of a consignor shipped property to consignees, and advised the latter of the shipment for account of the consignor, and directed the consignees to receive and hold it subject to the orders of the agent. Subsequently, the consignor assigned to three persons, severally, different sums out of the proceeds of sale, as security for debts due to them, and directed the consignees to hold the proceeds, subject to the order of the assignees, as specified. After notice to the consignees of the above assignment, the property arrived, and was received and sold by the consignees, but they made no express promise to the assignees, and, soon after the arrival of the property, attached it, for a debt due to them from the consignor. *Held*, that one of the assignees could not maintain an action at law against the consignees, to recover that part of the proceeds of sales which had been assigned to him, the receipt of the property not amounting to a promise to him. *Tiernan v. Jackson*, 5 P. 580....ix. 480.

5. Where several parties were jointly interested in the profit and loss of a series of voyages of a vessel, of which one of them was master and supercargo, it was held, that though a stranger could not be introduced as a partner during the pendency of these voyages, yet, after the last voyage had been terminated, the interest of one party might be assigned, and the assignee could maintain a bill for an account against the master and supercargo, joining the other proper parties. *Mathewson v. Clarke*, 6 H. 122....xvi. 625.

6. Under the statute of Alabama respecting the negotiation of single bills, &c., the obligor may show, as against the assignee suing in his own name, that the note has been avoided for fraud of the obligee, or may rely on such fraud and the damage arising therefrom as a partial or total failure of consideration. *Withers v. Greene*, 9 H. 213....xviii. 104.

7. A nominal plaintiff, suing for the benefit of his assignee, cannot, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against a subsequent suit for the same cause of action. *Welch v. Mandeville*, 1 W. 233....iii. 531.

8. Relief in equity against a judgment at law, upon certain bonds given for the indemnity of the obligee, as indorser of notes drawn by the obligor, the obligee having been indemnified. *Scott v. Shreeve*, 12 W. 605....vii. 390.

9. The assignee of such bonds takes them subject to all equities existing between the original parties. *Ib.*

10. Though the first purchaser of a *chose in action*, generally, has the better right, he may lose his preference by laches, as, under the circumstances of this case, he was held to have done. *Judson v. Corcoran*, 17 H. 612....xxi. 727.

11. When a debtor deposited with an attorney certain notes as security for claims against him, then in the attorney's hands, and subsequently gave verbal directions to the attorney to protect another creditor out of any balance which might remain, and the attorney gave to this last-mentioned creditor the control of a judgment recovered on one of the notes; *held*, that the creditor acquired an equitable interest in the judgment, by the direction of the debtor to the

attorney, and the action of the latter thereon. *Hinkle v. Wanzer*, 17 H. 353....xxi. 544.

12. An assignment of a policy of insurance, will entitle the assignee to receive from the underwriters the amount insured in case of a loss. *Spring v. South Carolina Insurance Company*, 8 W. 268....v. 411.

13. It is not necessary that the assignment should be accompanied by an actual delivery of the policy, to make a title against one who is not a *bonâ fide* purchaser. *Ib.*

14. An assignment of a *chose in action*, by a father to his son, is not subject to the objection of champerty. *Lewis v. Bell*, 17 H. 616....xxi. 731.

15. An assignment of a *chose in action* "in consideration of one dollar, and divers other good considerations," when attempted to be impeached by the representative of the assignor, may be supported by evidence of valuable and adequate consideration. *Ib.*

16. A question of fact as to the assignment of a judgment in whole or in part. *Rhodes v. Farmer*, 17 H. 464....xxi. 613.

17. A question as to priority of title to a judgment, one party claiming under an assignment, and the other under an execution sale. *Stockton v. Ford*, 11 H. 232....xviii. 609.

18. Question, whether a writing was intended as a naked authority to collect and control certain judgments, or as an assignment of the creditors' interest therein. *Held*, to be the former only. *Rogers v. Lindsey*, 13 H. 441....xix. 577.

19. A private act of parliament, made in pursuance of the agreement of parties within the realm and British subjects, to assign *choses in action* belonging to the wife of one of the parties, with the assent of the husband, the wife being a lunatic, passes the right of action thereon to the assignee, so that an action at law cannot be maintained in the name of the husband. *Cassell v. Carroll*, 11 W. 134....vi. 539.

BOND, A. 9, 10, 11.

## B. LIABILITIES OF THE ASSIGNOR AND ASSIGNEE.

1. An order to receive from the secretary at war any balance due under a certain contract does not authorize a payment of what is not due; and if paid, the person giving the order is not liable to refund. *United States v. Jones*, 8 P. 387....xi. 137.

2. The assignee of one share of a pending mercantile adventure, who makes an express promise to the managing partner to assume the liability to him of the assignor, on which the managing partner acts, by thereafter prosecuting the adventure, treating the assignee as his copartner, is liable to an action at law on such promise. *Clark's Executors v. Oarrington*, 7 C. 308....ii. 546.

3. A legatee, by taking from the executors an assignment of a mortgage on which was due a sum greater than the amount of his legacy, did not make himself absolutely responsible for the difference, but only for the use of due diligence in its collection. *Hammond's Administrator v. Washington's Executor*, 1 H. 14....xiv. 478.

## ASSUMPSIT.

## A. WHEN IT LIES OR NOT, 35.

## B. CONSIDERATION, 35.

## C. INDEBITATUS ASSUMPSIT FOR MONEY PAID, HAD AND RECEIVED, WORK AND LABOR, GOODS SOLD, AND USE AND OCCUPATION, 36.

## A. WHEN IT LIES OR NOT.

1. If goods are sold and delivered on the faith of a promise in writing by a third person to become security for the payment of their price, an action of assumpsit will lie on the promise, though not originally made to any particular person. *Lawrason v. Mason*, 3 C. 492....i. 647.

2. Assumpsit lies in New York on an undertaking in Wisconsin, contained in a writing having a scrawl, and no seal affixed to the defendant's name; though, in the state where it was made, it has the effect of a deed. *Le Roy v. Beard*, 8 H. 451....xvii. 654.

3. Though assumpsit will not lie, if the action be to enforce a claim secured by a subsisting deed, yet if the contract under seal has been varied by a subsequent parol agreement, assumpsit will lie upon this substituted contract. *Fresh v. Gilson*, 16 P. 327....xiv. 324.

4. If a contract under seal be partly performed, and the execution of the residue prevented by the defendant, assumpsit upon a *quantum meruit*, for the work actually done, will not lie. *Young v. Preston*, 4 C. 239....ii. 86.

5. Assumpsit will not lie upon a policy of insurance under seal. *Marine Insurance Co. of Alexandria v. Young*, 1 C. 332....i. 421.

6. Assumpsit for use and occupation does not lie, if the holding by the defendant was adverse to the plaintiff, and the relation of landlord and tenant did not exist. *Lloyd v. Hough*, 1 H. 153....xiv. 541.

ASSIGNMENT OF CHoses IN ACTION, B. 2; PARTNERSHIP, B. 2; PLEADING, B. 18.

## B. CONSIDERATION.

BILLS, &c. C., G. 4; FOR FAILURE OF, *see* CONTRACT, D.

1. If a letter of guarantee acknowledge the receipt of one dollar, as a consideration, the guarantor is estopped to deny the existence of that consideration, and it is sufficient to support the promise. *Lawrence v. McCalmont*, 2 H. 426....xv. 178.

2. A total or partial failure of consideration, or any breach of a special contract for work, labor, and materials, may be given in evidence, in defence of an action thereon, though the damages from such failure or breach be unliquidated. *Winder v. Caldwell*, 14 H. 434....xx. 272.

ASSIGNMENT OF CHoses IN ACTION, A. 4; ATTORNEY AND COUNSEL, B. 4, 5, 6.

C. INDEBITATUS .ASSUMPSIT FOR MONEY PAID, HAD AND RECEIVED, WORK AND LABOR, GOODS SOLD, AND USE AND OCCUPATION.

BILLS, &c. G. 4; CONSTITUTIONAL LAW, D. 1; FRAUD, B. 2; PAYMENT, D.

1. An action for money paid will lie upon a special contract by which the plaintiffs, at the request of the defendants, detained their laborers and paid them wages, while waiting for materials which the defendants were to furnish. *Chesapeake and Ohio Canal Company v. Knapp*, 9 P. 541 . . . .xi. 476.

2. Upon a special contract executed on the part of the plaintiff, *indebitatus assumpsit* will lie for the price. *Bank of Columbia v. Patterson's Administrator*, 7 C. 299 . . . .ii. 540.

3. If a special agreement covers several subjects, each of which is capable of being distinctly closed and executed, and one of them has been so closed, *indebitatus assumpsit* may lie, though the residue of the subjects are not executed. *Perkins v. Hart*, 11 W. 237 . . . .vi. 578.

4. The official bond of a public officer does not extinguish the simple contract arising on his receipt of money. *Walton v. United States*, 9 W. 651 . . . .vi. 220.

5. A surety of a surety, who pays the debt, may maintain an action for money paid against the principal. *Hall v. Smith*, 5 H. 96 . . . .xvi. 323.

6. The defendants having ordered the plaintiff to purchase salt for them, and to draw on them for the amount, and he having so purchased and drawn, they are bound to accept and pay his bills; and if they do not, he may recover from them the amount of the bills and damages and costs of protest (if he has paid the same) upon a count for money paid, laid out, and expended, and the bills of exchange may be given in evidence on that count. *Riggs v. Lindsay*, 7 C. 500 . . . .ii. 643.

7. If, after the protest of the bills, the plaintiff sell the salt without orders, it shall not prejudice his right of action, although he render no account of sales to the defendants. *Ib.*

8. If a note, given in renewal of a former note, turns out to be void, the payee and holder may recover on the money counts the amount lent. *Moore v. Bank of the Metropolis*, 13 P. 302 . . . .xiii. 164.

9. An action for money lent, or had and received, cannot be maintained on a collateral promise. *Douglass v. Reynolds*, 7 P. 113 . . . .x. 415.

10. An indorsement "without recourse," is not evidence of money had and received by the indorser to the use of the indorsee. *Welch v. Lindo*, 7 C. 159 . . . .ii. 496.

11. Upon the issue of *non-assumpsit*, the defendant may give in evidence the record of a former judgment between the same parties on the same cause of action. *Young v. Black*, 7 C. 565 . . . .ii. 669.

AGENT, F. 1, 2; EXECUTOR, &c. A. 12.

## ATTACHMENT.

## FOREIGN ATTACHMENT; STATE COURTS AND MAGISTRATES, A. 3.

1. An equity of redemption of real estate in Maryland is liable to attachment. *Pratt v. Law*, 9 C. 456....iii. 428.

2. Under the act of assembly of Maryland of 1795, c. 56, if the defendant appears, and dissolves the attachment, a declaration and subsequent pleadings are not necessary, as in other actions, but the cause may be tried upon a short note. *Goldsborough v. Orr*, 8 W. 217....v. 390.

3. But where the plaintiff is entitled to a stipulated sum of money, in lieu of a specific article to be delivered, an attachment will lie, under that act. *Ib.*

## PRIORITY OF PAYMENT OF UNITED STATES, A. 6.

## ATTORNEY AND COUNSEL.

## A. WHO MAY BE, 37.

## B. RIGHTS, POWERS, AND DISABILITIES, AND HEREIN OF THE EVIDENCE OF THEIR AUTHORITY, 37.

## C. DUTIES, 38.

## D. CONTINUANCE OF THE RELATION, 38.

## E. REMOVAL FROM OFFICE AND DISQUALIFICATION, 38.

## A. WHO MAY BE.

1. H. having been originally admitted as an attorney of this court, on motion, his name was taken from the roll of attorneys and placed upon the list of counsellors, and he was qualified *de novo*, as counsellor. *Ex parte Halliwell*, 3 D. 411....i. 290.

2. If a counsellor is entitled to admission to the bar of this court under its rules, the fact that his name has been stricken from the roll of counsellors of one of the district courts of the United States, for a contempt, will not exclude him. *Ex parte Tillinghast*, 4 P. 108....ix. 21.

## B. RIGHTS, POWERS, AND DISABILITIES, AND HEREIN OF THE EVIDENCE OF THEIR AUTHORITY. (EVIDENCE, C. 1, L. 1.)

1. An attorney at law, as such, has authority to submit the cause to arbitration. *Holker v. Parker*, 7 C. 436....ii. 606.

2. But an attorney at law, merely as such, has no right, strictly speaking, to make a compromise for his client. *Ib.*

3. Acts of an attorney at law in receiving satisfaction of a judgment levied



on land, held binding on the creditor, upon the ground of ratification by him. *Erwin v. Blake*, 8 P. 18....xi. 8.

4. The attorney of an indorsee, who was prosecuting suits upon a note against the maker and indorser, agreed with the latter that if he would waive all defence, and suffer a judgment, he would immediately issue an execution against the maker, whose property he had ascertained to be unencumbered and sufficient. *Held*, 1. The attorney had authority to make this agreement. *Union Bank of Georgetown v. Geary*, 5 P. 99....ix. 241.

5. 2. The consideration was sufficient, even though a subsequent decision of this court showed that the defence of the indorser could not have prevailed. *Ib.*

6. 3. That the plaintiff, having refused to issue an execution against the maker, who had sufficient property, the judgment against the indorser must be enjoined. *Ib.*

7. It is not necessary that the record in an equity cause should contain a warrant of attorney to a duly licensed practitioner to appear for and represent a corporation which is the complainant. *Osborn v. Bank of the United States*, 9 W. 738....vi. 251.

8. No attorney or solicitor can withdraw his name from a cause, after he has once entered it, without the leave of the court, and a withdrawal after a decree would not be allowed. *United States v. Curry*, 6 H. 106....xvi. 617.

AWARD, A. 2; JURISDICTION, L. 3, 5, 6.

#### C. DUTIES.

*Supra*, B. 8.

#### D. CONTINUANCE OF THE RELATION.

*Supra*, B. 8.

#### E. REMOVAL FROM OFFICE AND DISQUALIFICATION.

In a regular complaint against an attorney, charges cannot be received and acted on unless made on oath. But he may himself waive the preliminary of an affidavit, and the court may proceed, at his instance, to investigate the charges, upon testimony, on oath and regularly taken. *Ex parte Burr*, 9 W. 529....vi. 168.

#### AUCTION.

1. An agreement by two land companies to appoint a common agent to buy for their joint and several account at a public sale of the public lands, is not a fraud on the United States. *Oliver v. Piatt*, 3 H. 383....xv. 479.

2. An auctioneer pretended to have received bids, not actually made, and thus ran up the price of the property sold from \$20,000, which was the last real bid, to \$40,000. The vendors had no knowledge of this fraud. The court decreed that the vendors should repay to the vendee \$20,000, being the excess over the highest real bid. *Veazie v. Williams*, 8 H. 134....xvii. 527

## AUDITA QUERELA.

## EXECUTIONS, E.

1. In modern practice, courts usually give a summary remedy on motion, where a writ of *audita querela* was formerly used; but a bill in equity will also lie. *Humphreys v. Leggett*, 9 H. 297 . . . . xviii. 151.

2. Therefore, where a defendant had a good defence, which accrued after the case was sent back to the circuit court from this court, and under the mandate of this court, was prevented from pleading it, equity relieved him, by enjoining the judgment. *Ib.*

## AUTHORITY.

AGENT; ATTORNEY, B.; AWARD, A.; POWERS.

## AUTREFOIS ACQUIT.

FORMER ACQUITTAL OR CONVICTION.

## AVERAGE.

INSURANCE, H.

## AWARD.

A. THE SUBMISSION, AND THE APPOINTMENT AND AUTHORITY OF REFEREES AND UMPIRES, 39.

B. VALIDITY OF AN AWARD, 40.

C. EFFECT OF AN AWARD, 41.

A. THE SUBMISSION, AND THE APPOINTMENT AND AUTHORITY OF REFEREES AND UMPIRES.

1. When the price of land and not the question of title, is submitted, the submission and award need not be by deed. *Davy's Executors v. Faw*, 7 C. 171 . . . . ii. 502.

2. A corporation, being a party to an action in court, may refer it to arbitrators, and, if its attorney of record assents to do so, it will be presumed he was duly authorized. *Alexandria Canal Co. v. Swann*, 5 H. 83 . . . . xvi. 315

3. An umpire may be selected before the referees have disagreed. *Ib.*

4. An umpire may be selected before the referees have disagreed; if he is a third referee, and not an umpire, he must be so selected as to constitute a part of the board. *Lutz v. Linthicum*, 8 P. 165 . . . . xi. 58.

5. Where an action of trespass, to which only the general issue had been pleaded, was referred to arbitrators, no question of justification was before them. *Alexandria Canal Company v. Swann*, 5 H. 83 . . . . xvi. 315.

6. On an arbitration between partners, held that they had appropriated a part of the assets of the firm, and that the arbitrator had not power to disturb that arrangement. *McCormick v. Gray*, 13 H. 26 . . . . xix. 368.

*Infra*, B. 13.

## B. VALIDITY OF AN AWARD.

1. If an award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing, a court of equity will not set it aside, for error in law or fact. *Burchell v. Marsh*, 17 H. 344 . . . . xxi. 540.

2. The case examined, and held not to show such excess of authority, or unfairness of intention, or negligent consideration of the case, as should induce the court to interfere. *Ib.*

3. It is not necessary to the validity of an award that each party should be ordered to do, or not to do, something. *Karthus v. Ferrer*, 1 P. 222 . . . . vii. 540.

4. An award made under a rule of reference entered in an action pending, is sufficiently certain, if it find that a sum of money is to be paid in full for the damages and expenses on account of the subject-matter of the suit, though it do not in terms declare that the defendant is to pay the money. *Lutz v. Linthicum*, 8 P. 165 . . . . xi. 58.

5. An ambiguity in an award, not affecting the interest of the party objecting to it, is not available by him. *Karthus v. Ferrer*, 1 P. 222 . . . . vii. 540.

6. Where claims against a party, both in his own right and in a representative character, are submitted to the award of arbitrators, it is a valid objection to the award, that it does not precisely distinguish between moneys which are to be paid by him in his representative character, and those for which he is personally bound. *Lyle v. Rodgers*, 5 W. 394 . . . . iv. 677.

7. An award may be void in part, and good for the residue. But if the part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void. *Ib.*

8. Though one part of an award may sometimes be good and another part bad, the part allowed to stand must appear to be in no way affected by the departure of the referee from the submission. *McCormick v. Gray*, 13 H. 26 . . . . xix. 368.

9. To impeach an award made under a conditional submission, upon the ground that the award does not cover all matters submitted, the party must distinctly show that there were other matters submitted, of which express notice was given to the arbitrator, and that he omitted to determine them. *Karthus v. Ferrer*, 1 P. 222 . . . . vii. 540.

10. A suit in equity in a circuit court being at issue, the parties agreed to

submit it to arbitrators, and their agreement was made a rule of court. The arbitrators made an award, and exceptions having been taken to it, it was affirmed by an interlocutory decree, which directed a reference to the register to ascertain the amount due, upon the principles of the award. Upon his report a final decree was made, and on appeal to this court the decree was reversed, because the award, in one particular, was not final. *Carnochan v. Christie*, 11 W. 446....vi. 660.

11. An award will not be set aside in equity on account of an omission by the arbitrators to act upon part of the matters submitted, unless that omission shall have injured the complainant. *Davy's Executors v. Faw*, 7 C. 171....ii. 502.

12. An award is not void because it is in the alternative, and contingent, nor because one of the alternatives requires the party to do an act in conjunction with others, not parties to the award, and over whom he has no control. *Thornton v. Carson*, 7 C. 596....ii. 681.

13. An authority to two, to fix the value of a tract of land, and, if they cannot agree, to choose a third, "who, together with the other two, shall agree on the price," does not require all three to agree; it appearing that the parties intended the price should be fixed at all events; if two of the three agree and the other dissents, this is an execution of the authority. *Hobson v. M'Arthur's Heirs*, 16 P. 182....xiv. 241.

14. It is not necessary that it should appear on the face of the award that the parties had notice of the time and place of hearing; *prima facie* this is presumed. If not true, a motion to set aside the award, founded on affidavit, is the regular course. *Lutz v. Linthicum*, 8 P. 165....xi. 58.

15. So, where the local law required a copy of the award to be served, before moving for judgment, the record need not show that this was done. It is presumed. *Ib.*

### C. EFFECT OF AN AWARD.

1. After an award, and the receipt of the money awarded, an action for the original cause cannot be maintained upon the ground that the claimant did not claim or prove before the referee all the damages he had sustained. *Kendall v. Stokes*, 3 H. 87....xv. 296.

2. Where a submission was made by one partner of a "late firm," and it did not appear that any other partner existed, a direction in an award that the firm should pay, was held to be equivalent to a direction that he should pay. *Karthauss v. Ferrer*, 1 P. 222....vii. 540.

## BAIL.

A. RIGHT TO, 42.

B. NATURE AND EXTENT OF LIABILITY; WHAT FIXES OR DISCHARGES BAIL, AND HEREIN OF SUMMARY DISCHARGE OF BAIL, 42.

C. IN WHAT COURT AND TO WHAT ACTIONS LIABLE, 42.

## A. RIGHT TO.

A prisoner committed by a district judge, on a charge of treason, admitted to bail. *United States v. Hamilton*, 3 D. 17 . . . .i. 76.

## B. NATURE AND EXTENT OF LIABILITY; WHAT FIXES OR DISCHARGES BAIL, AND HEREIN OF SUMMARY DISCHARGE OF BAIL.

1. The responsibility of special bail depends not merely on the terms of the bail-piece, but also upon the rules of the court and the principles of law applicable thereto. *Beers v. Haughton*, 9 P. 329 . . . .xi. 376.

2. Bail is not definitively fixed, even at common law, by a return of *non est*. *Ib.*

3. If bail have a legal right to a discharge, they may apply to the court to have *exoneretur* entered, or may plead the matter in bar when a suit is brought. *Ib.*

4. Where the principal, if surrendered, would be entitled to an immediate and unconditional discharge, the bail may have relief without a surrender. *Ib.*

5. The bail is fixed by the death of the principal after the return of the *ca. sa.* and before the return of the *scire facias*; and the bail is not entitled to an *exoneretur* in such a case. *Davidson v. Taylor*, 12 W. 604 . . . .vii. 389.

6. The judgment against the debtor is conclusive evidence of the existence and amount of the debt in a *scire facias* against the bail. *Morsell v. Hall*, 13 H. 212 . . . .xix. 464.

7. A motion to enter an *exoneretur* is not a defence to the *scire facias*, but an appeal to the discretion of the court for a summary exercise of its equitable power; and the refusal of the motion cannot be assigned for error. *Ib.*

8. Under the act of assembly of Virginia, the defendant may enter special bail, and defend the suit at any time before the entering up of judgment upon a writ of inquiry executed; and the appearance of the defendant, or the entry of special bail, before such judgment, discharges the appearance bail. *Bartle v. Coleman*, 6 W. 475 . . . .v. 127.

9. If the defendant does not appear, or give special bail, the appearance bail may defend the suit, and is liable to the same judgment as the defendant would have been liable to; but the defendant cannot appear and consent to a reference, the report and judgment on which is to bind the appearance bail as well as himself. Such a joint judgment is erroneous, and will be reversed as to both. *Ib.*

10. The mere institution of insolvent proceedings in Louisiana, which are not prosecuted to a discharge of the debtor, do not release his bail. *Lyon v. Auchincloss*, 12 P. 234 . . . .xii. 708.

## C. IN WHAT COURT AND TO WHAT ACTIONS LIABLE.

Debt on a recognizance of bail, is an original action, and need not be brought in the court in which the judgment was rendered. *Davis v. Packard*, 7 P. 276 . . . .x. 486.

## BAILMENT.

## A. GENERALLY, 43.

## B. CARRIERS, 43.

## 1. GOODS.

## 2. PASSENGERS.

## A. GENERALLY.

*Infra*, B. 2.

## B. CARRIERS.

## 1. GOODS.

1. The general owner of specie who has employed a person, commonly called an expressman, to transport it for him, may maintain a suit against the carriers, who are proprietors of a steamboat, for its loss through the fault of the steamboat proprietors, or their agents, with whom such expressman had a contract to transport the effects in his charge. *New Jersey Steam Navigation Company v. Merchants' Bank of Boston*, 6 H. 344....xvi. 722.

2. But in such a case the rights of the general owner are controlled by a valid contract between the expressman and the steamboat proprietors. *Ib.*

3. A stipulation that the carriers are not to be responsible in any event for loss or damage, was not intended to exonerate them from liability for want of ordinary care. *Ib.*

*Infra*, B. 2.

## 2. PASSENGERS.

1. In an action against the proprietor of a stage-coach, the facts that the coach was upset, and the plaintiff injured, are sufficient *prima facie* evidence of negligence or want of skill of the driver, and shifts the burden of proof upon the defendant, to show that the driver was in every respect qualified, and acted with reasonable skill, and the utmost caution; and if the disaster was occasioned by the least want of due skill or of prudence on his part, the defendant was answerable; but not if it was occasioned solely by physical disability arising from extreme cold. *Stokes v. Saltonstall*, 13 P. 181....xiii. 114.

2. If the plaintiff was placed in peril by the negligence of the driver, and jumped from the stage, reasonably supposing it would upset, or that the driver was incapable of managing his horses, he may recover, though jumping in fact increased the peril, or even caused the stage to upset. *Ib.*

3. The theory of the three degrees of negligence examined. *Steamboat New World v. King*, 16 H. 469....xxi. 260.

4. If an employment requires skill, failure to exert it is culpable negligence, for which an action lies. *Ib.*

5. Under the 13th section of the act of July 7, 1838, (5 Stats. at Large, 306,) if a person is injured on board a steamboat by the injurious escape of

steam, it is incumbent on the owners, in an action against them, to prove there was no negligence. *Ib.*

6. An allegation that the plaintiff, at the defendants' request, became a passenger in a certain coach, to be carried for a certain reward to the defendants, and thereupon it was their duty to use due care, &c., lays a sufficient foundation for the action on the case, by showing a legal duty to use due care, &c. *Stockton v. Bishop*, 4 H. 155....xvi. 65.

7. A carrier of slaves is not responsible to the same extent as a carrier of merchandise; if the carriage be gratuitous, he is liable only for gross negligence. *Boyce v. Anderson*, 2 P. 150....viii. 58.

## BANK OF THE UNITED STATES.

### CORPORATIONS, D. 3.

1. The Bank of the United States is not restrained by its charter from purchasing a promissory note. *Fleckner v. Bank of the United States*, 8 W. 338....v. 437.

2. The charter of the Bank of the United States confers on the bank the right to sue in any circuit court of the United States. Such a suit is a case arising under a law of the United States, within the meaning of those words in the constitution; consequently, it is within the judicial power of the United States, and congress could confer upon the circuit courts jurisdiction over it. *Osborn v. Bank of the United States*, 9 W. 738....vi. 251.

3. An agreement "corruptly and usuriously" to loan depreciated bills, taking therefor a note on time, bearing legal interest, is a violation of the charter of the Bank of the United States. *Bank of the United States v. Owens*, 2 P. 527....viii. 198.

4. Exchanging notes of the Bank of Kentucky, and a credit at that bank, for the note of a private person, is not dealing or trading, within the prohibition in the charter of the Bank of the United States. *Bank of the United States v. Waggener*, 9 P. 378....xi. 395.

CONSTITUTIONAL LAW, A. 16, N. 10, 11; CRIMINAL LAW, B. 2, 3.

## BANK BILLS.

### CRIMINAL LAW, B.

## BANKRUPT LAWS.

### CONSTITUTIONAL LAW, A. L. P.

A. OF THE COMMISSION, ASSIGNMENT, AND THE RIGHTS, POWERS, AND DUTIES OF ASSIGNEES, 45.

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1. SET OFF.
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3. CLAIMS PROVABLE.
4. OTHER MATTERS.

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## A. OF THE COMMISSION, ASSIGNMENT, AND THE RIGHTS, POWERS, AND DUTIES OF ASSIGNEES. (INSURANCE, H. 2.)

1. Under a separate commission of bankruptcy against one partner, only his interest in the joint effects passes. *Harrison v. Sterry*, 5 C. 289 . . . . ii. 267.

2. Upon the death of an assignee under the bankrupt law of the United States, (2 Stats. at Large, 19,) the right of action for a debt due to the bankrupt vested in the executor of the assignee. *Richards v. Maryland Insurance Company*, 8 C. 84 . . . . iii. 36.

## CONFLICT OF LAWS, B. 3.

## B. OF THE BANKRUPT AND HIS RIGHTS.

1. Under the bankrupt act of 1841, (5 Stats. at Large, 440,) fiduciary debts, contracted before the passage of the act, constitute no objection to the discharge of the debtor from other debts. *Chapman v. Forsyth*, 2 H. 202 . . . . xv. 87.

2. A balance, due from a factor to his principal, is not a fiduciary debt within the meaning of that act. *Ib.*

3. Where a bankrupt, having a valid claim for a large sum, on the government of Mexico for the seizure of a vessel and cargo, was making efforts to obtain its allowance and payment before and after his bankruptcy, but gave no information concerning it to his assignee, and inserted in his schedule no allusion to it except "Mexican Republic subject to a mortgage." *Held*, that a purchase by him of all his effects for a nominal sum, from his assignee, in the name of a third person, at an auction sale held under an order of the court in bankruptcy, was fraudulent and void. *Clark v. Clark*, 17. H. 315 . . . . xxi. 520.

4. The assignee being dead and no other appointed, *held*, that a bill by a creditor in behalf of himself and all other creditors, to which the new assignee, when appointed, made himself a party, filed within the time required by the eighth section of the act of March 3, 1849, (9 Stats. at Large, 394,) was in compliance with that act, and the circuit court for the District of Columbia could adjudicate on the title to the fund. *Ib.*

5. A certificate of discharge under the bankrupt law, (5 Stats. at Large, 440,) of the United States, did not release the bankrupt from a fine imposed by a court of chancery of a State, for breach of an injunction. *Spalding v. New York*, 4 H. 21 . . . . xvi. 12.

## C. OF THE CREDITORS.

## 1. SET-OFF.

Under the bankrupt act, (2 Stats. at Large, 19,) a debt due from a firm, of which the bankrupt was a member, dissolved before the bankruptcy, may be set off against a debt due to the bankrupt alone, in an action by his assignee. *Tucker v. Oxley*, 5 C. 34....ii. 183.

## 2. PREFERENCE AND LIEN.

1. Under the bankrupt law of August 12, 1841, (5 Stats. at Large, 440,) a circuit court of the United States rightly dismissed a bill, the object of which was to deprive a creditor of the benefit of a judgment recovered in a state court prior to the bankruptcy, and which operated as a mortgage on the lands of the bankrupt, no fraud or other cause of invalidity being alleged. *Nugent v. Boyd*, 3 H. 426....xv. 501.

2. A lien acquired by a decree of a state court in a suit instituted after notice of an act of bankruptcy committed by a merchant, is invalid; and the party who has received property of the bankrupt, or its proceeds, under such a decree, must account to the assignee therefor. *Shawhan v. Wherritt*, 7 H. 627....xvii. 328.

3. An attachment on *mesne process*, under the laws of New Hampshire, creates a lien, protected by the proviso of the second section of the bankrupt act of 1841, (5 Stats. at Large, 442,) and not defeasible by the interposition of the plea of a discharge of the bankrupt in bar of the action. *Peck v. Jenness*, 7 H. 612....xvii. 320. *Colby v. Ledden*, 7 H. 626....xvii. 328.

## PRIORITY OF PAYMENT OF THE UNITED STATES, A. 9.

## 3. CLAIMS PROVABLE.

Under the 4th and 5th sections of the bankrupt act of 1841, (5 Stats. at Large, 443, 444,) a surety, for a debt payable *in futuro* at the time of the decree of bankruptcy, could prove his claim; and the bankrupt is discharged by his certificate from all liability to the surety for money subsequently paid on account of the debt. *Mace v. Wells*, 7 H. 272....xvii. 117.

*Supra*, B. 5.

## 4. OTHER MATTERS.

1. A fiduciary creditor is not affected by proceedings in bankruptcy, unless he has voluntarily come in and proved his debt. *Chapman v. Forsyth*, 2 H. 202....xv. 87.

2. Where, by the local law, a judgment or execution makes a lien on property, a power of attorney given by the debtor to confess judgment, is a security made or given by the debtor, under the second section of the bankrupt act, (5 Stats. at Large, 442,) and is void, if accompanied by the facts which, according

to that act, avoid securities, made or given by the debtor. *Buckingham v McLean*, 13 H. 150 . . . xix. 440.

3. But it is not sufficient to avoid it that the debtor should have contemplated a state of insolvency; he must have contemplated an act of bankruptcy, or an application by himself to be declared a bankrupt, at the time when he gave the power of attorney. *Ib.*

4. The giving of such a power of attorney is not, *per se*, an act of bankruptcy, unless done willingly, or fraudulently; and it is not fraudulent, if the donee be a *bonâ fide* creditor, unless the debtor contemplated bankruptcy in the sense above explained. *Ib.*

#### D. OF THE JURISDICTION AND POWERS OF COURTS UNDER THESE LAWS.

1. Over a suit pending in the court of common pleas of the State of New Hampshire, or any question involved therein, the district court of the United States sitting in bankruptcy, could exercise no control, either directly, or by enjoining the plaintiff. *Peck v. Jenness*, 7 H. 612 . . . xvii. 320; *Colby v. Ladden*, 7 H. 626 . . . xvii. 328.

2. Where the district court, sitting in bankruptcy, reformed a first mortgage without notice to the second mortgagee, and subsequently, on the petition of the assignee, and with notice to the second mortgagee, caused the mortgaged property to be sold, *held*, that the second mortgagee was bound by this last proceeding, and could not maintain a bill against the first mortgagee, who was the purchaser under the sale, to charge his second mortgage on the property. *Fowler v. Hart*, 13 H. 373 . . . xix. 538.

3. Under the bankrupt act of August 12, 1841, (5 Stats. at Large, 440,) the district courts had power to order a sale of property of the bankrupt, under mortgage, and make a title free from the mortgages, marshalling and disposing of the proceeds, according to the priorities of those interested. *Houston v. City Bank of New Orleans*, 6 H. 486 . . . xvi. 790.

4. The bankrupt act of August 19, 1841, (5 Stats. at Large, 440,) conferred upon district courts of the United States power to determine the validity of a mortgage alleged to exist on the property of the bankrupt. *Ex parte Christy*, 3 H. 292 . . . xv. 451.

5. The bankrupt act of 1841, § 13, (5 Stats. at Large, 448,) makes the proceedings matter of record, and the public notice of them, required by the act, having been given, the creditors cannot impeach the decree of bankruptcy collaterally, but are bound thereby as by a decree *in rem*. *Shawhan v. Wherritt*, 7 H. 627 . . . xvii. 328.

#### E. LIMITATION OF ACTIONS.

The eighth section of the bankrupt act, (5 Stats. at Large, 446,) limits actions to recover property, &c., against a claimant other than the bankrupt. *Clark v Clark*, 17 H. 315 . . . xxi. 520.

## BANKS.

## CORPORATIONS.

1. The subscription of the whole amount of the capital stock of a bank is not a condition precedent to its corporate existence, unless made so by the terms of its charter. *Minor v. Mechanics' Bank of Alexandria*, 1 P. 46....vii. 445.

2. If a bank receive, as genuine, forged notes purporting to be its own, and pass them to the credit of a depositor who acts in good faith, it is bound by the credit thus given, and the notes must be treated as cash. *Bank of the United States v. Bank of the State of Georgia*, 10 W. 333....vi. 423.

3. A bank which receives a bill for collection is the agent of the holder, not of another bank which merely transmits the bill for the holder, and is liable to the holder for a want of due diligence. *Bank of Washington v. Triplett*, 1 P. 25....vii. 433.

4. If negotiable paper, not at maturity, be indorsed and delivered to a bank merely for collection, and be sent by such bank to another bank for collection, without notice that it does not belong to the former, the latter may retain the paper and its proceeds to satisfy a claim for a general balance against the former, if that balance has been allowed to arise and remain on the faith of receiving payment from such collections, pursuant to a usage between the two banks. *Bank of the Metropolis v. New England Bank*, 1 H. 234....xiv. 583.

5. If a note is discounted in renewal of a former note, the law does not prevent the bank from charging the former note to the last indorser, and crediting him with the proceeds of the last note. *Fullerton v. Bank of the United States*, 1 P. 604....vii. 723.

6. If the bank, on presentation of the certificate of deposit, tender one half its amount, it is too late afterwards to object that no check accompanied the certificate. *Bank of the Commonwealth of Kentucky v. Wister*, 2 P. 318....viii. 123.

7. A banking corporation, authorized to deal in exchange, is empowered by its charter to purchase bills, through an agent, in another State. *Bank of Augusta v. Earle*, 13 P. 519....xiii. 277.

8. This power, conferred by the law of one State, can have no operation in another State, save through that comity which is part of the law of nations. *Ib.*

9. Though all the corporators are citizens of the State which created the corporation, the artificial being, created by the charter, cannot claim the rights of the corporators as citizens of the United States, to make contracts in other States. *Ib.*

10. A corporation can exist only within the limits of the sovereignty which created it, but it may act elsewhere, through agents, if the laws of other countries permit. *Ib.*

11. By the comity of nations, foreign corporations are allowed to make contracts within their limits, not contrary to their known policy, or injurious to their interests. *Ib.*

12. There is nothing in the constitution or laws of Alabama which enables

this court to declare that the purchase of bills of exchange there, by a foreign corporation, is contrary to the policy of that State. *Ib.*

13. The Mechanics' Bank of Alexandria, under its charter, has no lien, for debts of a trustee, on stock held in trust, with the knowledge of the board of directors. *Mechanics' Bank of Alexandria v. Seton*, 1 P. 299 . . . .vii. 585.

14. A condition of a cashier's bond, "well and truly to execute the duties of cashier," includes not only honesty, but reasonable skill and diligence. *Minor v. Mechanics' Bank of Alexandria*, 1 P. 46 . . . .vii. 445.

15. A usage of the board of directors, to permit the cashier to misapply the funds of the bank, cannot exonerate his sureties. *Ib.*

16. The cashier's bond, in this case, was held to cover all defaults in duties, from time to time annexed to the office, by those having the control of the bank. *Ib.*

17. If a cashier, on leaving his office, fail to pay over or account to the bank for any part of the moneys of the bank received by him, the presumption is that he wilfully wasted or misapplied them, and the burden is on him or his sureties to show the contrary. *Ib.*

18. The acceptance of a cashier's bond by the board of directors of the bank, may be proved, without the production of a written record, by the facts that the person acted as cashier, and was recognized as such by the directors, and that the bond was required to be given as a condition precedent to his so acting, and was actually among the corporate documents. *Bank of the United States v. Dandridge*, 12 W. 64 . . . .vii. 29.

EQUITY, A. 20.

## BARRATRY.

SHIPPING, G.

## BASTARD.

The act of assembly of Maryland, of 1825, declaring illegitimate children to be capable of inheriting from their mother or from each other, &c., is not limited to the children of those capable by law of being married, but extends to the issue of an incestuous connection. *Brewer's Lessee v. Blougher*, 14 P 178 . . . .xiii. 419.

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MELIORATIONS.

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## A. FORM AND REQUISITES, AND WHAT ARE FOREIGN BILLS.

1. The words "*ne varietur*," written on a negotiable note by a notary, do not restrain its negotiability, by the laws of Louisiana. *Fleckner v. The Bank of the United States*, 8 W. 338 . . . v. 437.

2. A bill of exchange drawn in one State upon a person in another State, and payable in the latter State, is a foreign bill within the meaning of the 11th section of the judiciary act, (1 Stats. at Large, 78;) and if its holder is competent to sue the defendant in a circuit court, it is of no importance that the original payee was not thus competent. *Buckner v. Finley*, 2 P. 586 . . . viii. 218.

3. A bill of exchange drawn in Kentucky by one resident of that State on another resident there, but payable in New Orleans, is a foreign bill, and the

holder is entitled, by the law merchant, to recover of the drawer, after protest for non-payment, damages for reëxchange; the parties having liquidated those damages, it was presumed they adopted the proper rate. *Bank of the United States v. Daniel*, 12 P. 32....xii. 618.

4. The following paper:—

“No. 959. Mississippi Union Bank, Jackson, (Miss.,) February 8, 1840.

“I hereby certify that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate. \$1,500. Wm. P. Grayson, Cashier,”—not being paid at maturity and due demand made, and notice to an indorser having been given, *held* that it was negotiable and the indorser liable. *Miller v. Austen*, 18 H. 218....xix. 467.

## B. PARTIES, AND HEREIN OF ACCEPTANCES AND PAYMENTS FOR HONOR.

1. Though one dealing with an agent is generally bound to know the extent of his powers, yet, if the principal has, by his acts or declarations, authorized a third person to believe that the agent has power to draw, and such third person has taken the agent's bills, the principal cannot accept them for the honor of such third person. *Schimmelpennick v. Bayard*, 1 P. 264....vii. 560.

2. If drawees were bound in good faith to accept, they cannot assume the position of acceptors *supra* protest, for the honor of an indorser. *Ib.*

3. If a drawee has been in the habit of receiving consignments from the drawer, and has an open account with him, he is not bound to accept a bill, though in fact drawn against a particular shipment, if the letter of advice merely directed him to charge the bill in account, and the state of the account was such that the drawee had no funds of the drawer. *Ib.*

4. An acceptor, *supra* protest, for the honor of the indorser, may, on payment of the bill, recover of the indorser, though he accepted at the instance of the drawee, and as his agent, provided the indorser is not damnified by this indirect mode of proceeding on the part of the drawee. *Konig v. Bayard*, 1 P. 250 . . .vii. 558.

## C. CONSIDERATION AND ITS FAILURE.

1. Under the Virginia act of 1775, the actual consideration, though different from that stated on the face of the bill, governs, and the jury having found that to be such as to take the case out of the statute, the statement on the face of the bill is immaterial. *Brown v. Barry*, 3 D. 365....i. 261.

2. Although the consideration of a promissory note fail, by reason of the failure of the payee to perform his part of the agreement upon which it was given, yet if a new agreement as a substitute for the old one be entered into between the original parties to the note, this failure of the original consideration creates no equity in favor of the maker of the note against the indorsee, even in Virginia. *Young v. Grundy*, 7 C. 548....ii. 666.

3. Where a promissory note was given for the purchase of real property,



*held* that the failure of consideration through defect of title must be total, in order to constitute a good defence to an action on the note. *Greenleaf v. Cook*, 2 W. 13....iv. 5.

4. But where the note is given with full knowledge of the extent of the encumbrance, and the party thus consents to receive the title, its defect is no legal bar to an action on the note. *Ib.*

5. Any partial defect in the title or the deed is not inquirable into by a court of law in an action on the note; but the party must seek relief in chancery. *Ib.*

#### D. PRESENTMENT FOR ACCEPTANCE AND PROCEEDINGS THEREON.

AGENT, E, 1; *Infra*, F.

#### E. PRESENTMENT FOR PAYMENT AND PROCEEDINGS THEREON.

*Infra*, F.

1. A notary must present the bill to the acceptor, when he demands payment thereof; and a protest, which states only that payment was demanded, is not admissible in evidence to prove presentment of the bill. This rule of the law merchant exists in Louisiana. *Musson v. Lake*, 4 H. 262....xvi. 103.

2. A mistake in the christian name of the acceptor, in a copy of a bill of exchange inserted in the protest, the other descriptive particulars being sufficient to identify the bill, does not vitiate the protest. *Dennistoun v. Stewart*, 17 H. 606....xxi. 722.

3. No protest of a promissory note is necessary, by the common law. *Young v. Bryan*, 6 W. 146....v. 43.

4. A protest of an inland bill or promissory note is not necessary, nor is it evidence of the facts stated in it. *Union Bank v. Hyde*, 6 W. 572....v. 169.

5. When the action is founded on non-payment of bills of exchange, it is not necessary to produce protests for non-acceptance. *Clarke v. Russell*, 3 D. 415....i. 295.

6. It is not necessary, in Mississippi, or by the general law merchant, that a promissory note should be protested by a notary, or that he should give the notices of the dishonor. *Burke v. McKay*, 2 H. 66....xv. 35.

7. To charge one who indorses a promissory note for the accommodation of the maker, a demand on the maker and notice to the indorser are necessary. *French's Executrix v Bank of Columbia*, 4 C. 141....ii. 48.

8. A demand of payment of a promissory note must be made of the maker, on the last day of grace; and where the indorser resides in a different place, notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the succeeding day. *Lenox v. Roberts*, 2 W. 878....iv. 139.

9. Where the maker of a note, within ten days before it became payable, had removed into another jurisdiction without the knowledge of the holder, a presentment at his last place of abode in the jurisdiction was held sufficient. *M'Gruder v. Bank of Washington*, 9 W. 598....vi. 204.

10. Though the maker of a note be dead, and the indorser be his administrator, a demand on him as administrator, and notice to him as indorser, are necessary to charge him as indorser. *Magruder v. Union Bank of Georgetown*, 3 P. 87 . . . . viii. 299.

11. Demand on the maker of a note, payable at a bank, need not be averred or proved; failure to make the demand, and damage therefrom, is matter of defence. *Brabston v. Gibson*, 9 H. 263 . . . . xviii. 186.

12. On a note payable at and owned by a bank, no formal demand of payment is necessary; it is sufficient if the note is at the bank, and remains unpaid at the expiration of business hours. *Bank of the United States v. Carneal*, 2 P. 543 . . . . viii. 204.

13. It is sufficient evidence of a demand of payment of a note made payable at a particular bank, that the note was at the bank, was its property, and was unpaid at maturity. *Fullerton v. Bank of the United States*, 1 P. 604 . . . . vii. 723.

14. In an action against an indorser, on a note payable at a particular bank, the bank not being the holder, an averment of a demand at that bank is indispensable. *Bank of the United States v. Smith*, 11 W. 171 . . . . vi. 547.

15. But if the bank is the holder, an allegation that the note was presented to the maker and payment refused, under which competent evidence of a demand was introduced at the trial without objection, is so far sufficient that the judgment will not be reversed. *Ib.*

16. A protest of a bill, payable at and held by a bank, need not state to what officer it was presented, or who replied it would not be paid; a statement that it was presented at the bank, and payment refused, is sufficient. *Hildeburn v. Turner*, 5 H. 69 . . . . xvi. 304.

17. If a bill has been duly presented for payment or acceptance, and the presentment noted, the protest may be drawn up afterwards, when convenient. *Bailey v. Dozier*, 6 H. 23 . . . . xvi. 587.

18. Though a usage existed in the District of Columbia, and had been sanctioned by decisions of this court, not to demand payment of notes discounted by banks, until the day after the third day of grace, yet a note not discounted, and not within this usage, is governed by the law merchant. *Cookendorfer v. Preston*, 4 H. 317 . . . . xvi. 124.

#### EVIDENCE, F. 4; PROTEST, 2.

### F. NOTICE TO DRAWERS AND INDORSEES.

#### 1. FORM OF NOTICE.

1. In a notice to an indorser, it is not necessary to name the holder. *Mills v. Bank of the United States*, 11 W. 431 . . . . vi. 652.

2. A notice which states the demand and dishonor of a note, and that it comes from the holder or his agent, is sufficient, without stating in terms that the holder looks to the indorser for payment. *Bank of the United States v. Carneal*, 2 P. 543 . . . . viii. 204.

3. A note for \$1,400, but having the figures \$1,457 in the margin, was described in the notice to the indorser as a note for \$1,457; the parties and

the date were correctly named ; it was the only note of that maker and indorser in the bank, which was described as the holder. *Held*, that the variance was not material. *Bank of Alexandria v. Swann*, 9 P. 33 . . . . xi. 274.

4. A variance between the note and its description in the notice is not fatal, unless it render the notice insufficient to apprise the indorser what note is referred to. *Mills v. Bank of the United States*, 11 W. 431 . . . . vi. 652.

5. Such a notice need not declare that a demand was made on the maker at the place where the note was made payable ; it is enough if it states a demand on the maker, without showing where it was made. *Ib.*

## 2. WHEN, AND HOW, AND BY WHOM SENT OR GIVEN.

1. Where the second day of grace falls on Saturday, it is the last day of grace ; and notice of non-payment given to the drawer of a bill on that day, after a demand upon the acceptor on the same day, after business hours, is sufficient to charge the drawer. *Bussard v. Levering*, 6 W. 102 . . . . v. 22.

2. Notice to the drawer, by putting the same into the post-office, where the persons live in different places, is good. *Ib.*

3. After demand upon the maker of a note, on the third day of grace, notice to the indorser on the same day, is sufficient by the general law merchant. *Lindenberger v. Beall*, 6 W. 104 . . . . v. 23.

4. Evidence of a letter, containing notice, having been put into the post-office, directed to the indorser, at his place of residence, is sufficient proof of the notice to be left to the jury, and it is unnecessary to give notice to the defendant to produce the letter before such evidence can be admitted. *Ib.*

5. Notice, sent by mail, the next day after the dishonor of the note, is in due time. *Bank of Alexandria v. Swann*, 9 P. 33 . . . . xi. 274.

6. An indorser resided in the country, two or three miles from the town of Georgetown, where the note was payable, and was in the habit of receiving his letters at the post-office of that place ; *held*, that a notice put into that post-office and directed to him at Georgetown, was sufficient. *Bank of Columbia v. Lawrence*, 1 P. 578 . . . . vii. 707.

7. Where a note is sent by the indorsee to the bank at which it is payable, for collection, and the indorser lives in the same town in which the bank is established, notice must be given to him personally, or left at his dwelling ; it is not sufficient to place it in the post-office. *Bowling v. Harrison*, 6 H. 248 . . . . xvi. 672.

8. A notice to an indorser may be given by any agent of the holder, and a notary who has possession of the note is presumed to be such agent. *Harris v. Robinson*, 4 H. 336 . . . . xvi. 133.

*Supra*, E. 6, 8.

## 3. WHERE DIRECTED OR LEFT, AND HEREIN OF DUE DILIGENCE IN RESPECT THERETO.

1. If an indorser is in the habit of receiving his letters at either one of three post-offices, a notice directed to him at either, and sent by mail, is sufficient. *Bank of the United States v. Carneal*, 2 P. 543 . . . . viii. 204.

2. Where bills were dated at a particular place, it is due diligence to direct the notice there, in the absence of all knowledge by the holder, or the notary, that it is not the residence of the drawer. *Dickins v. Beal*, 10 P. 572....xii. 246.

3. Where the holder of a bill inquired of a person trading at a particular place, if he knew where an indorser resided, and he replied he resided at that place where he traded, and it did not appear that the holder had any better means of knowledge, it was held he had used due diligence to learn the place of abode of such indorser, and that a notice, put into the post-office, directed to him there, was sufficient. *Lambert v. Ghiselin*, 9 H. 552....xviii. 256.

4. After due diligence has been used, and notice sent accordingly, the holder is not obliged to give any further notice, though he should afterwards discover that the notice was directed to a place where the indorser did not reside. *Ib.*

5. There is no absolute obligation incumbent on the notary, who does not know the residence of an indorser, to inquire of the holder of the note. It depends on the circumstances, the question being whether due diligence has been used to discover his residence. *Harris v. Robinson*, 4 H. 336....xvi. 133.

6. A notary called at the dwelling-house of an indorser, who usually resided in the same town where a note was payable and the holder resided, to give notice of its dishonor. He found the door locked, and, on inquiry of the nearest resident, was informed the indorser and his family had left town on a visit. *Held*, this complied with the obligation of the holder as to notice. *Williams v. Bank of the United States*, 2 P. 96....viii. 30.

7. Notice left at the store of the son of an indorser, who resided in the same building, but had a usual place of business elsewhere, is not sufficient. *Bank of the United States v. Corcoran*, 2 P. 121....viii. 44.

8. Notice to an indorser, left with a fellow-boarder at a private boarding-house, where the indorser lodged, he being absent, is sufficient. *Bank of the United States v. Hatch*, 6 P. 250....x. 104.

*Supra*, E. 2, 8.

#### 4. HOW PROVED.

1. If notice has not been left with an indorser, or at his place of residence or business, or deposited in the post for him, the evidence that it duly reached him should be clear and direct. The interests of commerce forbid a departure from the settled rules as to notice, by leaving juries to find actual notice upon loose and indeterminate evidence. *Bank of the United States v. Corcoran*, 2 P. 121....viii. 44.

2. Testimony by a notary, that he sent notice, is admissible, without producing a copy of the notice, or proving its contents. *Dickins v. Beal*, 10 P. 572....xii. 246.

3. The holder may either prove the use of due diligence to give notice, or that notice was in fact received by the drawer in due season. *Ib.*

4. Evidence of the routes and course of the post may be admissible upon either of these questions. *Ib.*

EVIDENCE, H. 4.

## 5. WHEN WAIVED OR OTHERWISE NOT REQUIRED.

1. The following undertaking of the indorser of a promissory note, "I do request that hereafter any notes that may fall due in the Union Bank, on which I am or may be indorser shall not be protested, as I will consider myself bound in the same manner as if the said notes had been or should be legally protested," held to be a waiver of demand and notice; both parties having had a course of dealing founded on that construction. *Union Bank v. Hyde*, 6 W. 572....v. 169.

2. If an indorser who has not been duly notified unconditionally promise to pay the note, with a knowledge of all material facts, it is not necessary to prove notice or demand; but saying he knew the maker had not paid it, and was not to pay it, that it belonged to himself alone to pay it, is not sufficient, unless the indorser knew there had been no demand, and that so he was discharged. *Thornton v. Wynn*, 12 W. 183....vii. 108.

3. With some exceptions, notice of the dishonor of a bill need not be given to a drawer who had no funds in the hands of the drawee, or any right to draw. *Dickins v. Beal*, 10 P. 572....xii. 246.

4. A drawer had funds in the hands of the acceptor when the acceptance was made, but withdrew them, under an agreement to provide other funds before the maturity of the bill; if the drawer failed to keep this agreement he was not entitled to notice of the dishonor of the bill, for he had no right to expect it would be paid. *Rhett v. Poe*, 2 H. 457....xv. 167.

5. If the holder of a bill is unable, by due diligence, to ascertain the residence of the drawer, he is excused from giving him notice of the dishonor of the bill. *Ib.*

6. If the drawer and acceptor are copartners in the transaction out of which the bill grew, the drawer is not entitled to notice. *Ib.*

7. An indorser of a note, intended to guarantee a bill of exchange, cannot avail himself of want of notice to the drawer of the bill. *Ib.*

8. An indorser, who has settled with the maker, and discharged him from payment, is not entitled to notice of non-payment. *Burke v. McKay*, 2 H. 66....xv. 35.

## G. RIGHTS AND LIABILITIES. (GIVING TIME.)

## 1. MAKER.

1. In an action by an indorsee against the maker of a promissory note, evidence that the defendant acknowledged his indebtedness to the plaintiff on the notes, is admissible to prove his signature, as well as the genuineness of the indorsements. *M'Niel v. Holbrook*, 12 P. 84....xii. 643.

2. In an action against the maker of a note, payable at a particular time and place, a demand need not be averred or proved; if the maker was ready, and offered at the time and place to pay, it is matter of defence to be pleaded and proved by him. *Wallace v. M'Connell*, 13 P. 136....xiii. 91.

## CONFLICT OF LAWS, C. 2.

2. ACCEPTOR OF BILL, AND HEREIN OF WHAT AMOUNTS TO AN ACCEPTANCE.

1. A letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise.

*Coolidge v. Payson*, 2 W. 66....iv. 25.

2. The case of *Coolidge v. Payson*, (2 W. 66,) reviewed, and the rule confirmed, that a promise to accept, to amount to an acceptance, can be by a letter written within a reasonable time before or after the date of the bill, describing it in terms not to be mistaken, promising to accept it, and shown to the person who afterwards takes the bill on the credit of the letter. *Schimmelpennich v. Bayard*, 1 P. 264....vii. 560.

3. A parol promise to accept a particular bill, made to the payee, for a valuable consideration, moving from him to the drawee, binds the promisor, whether the bill had been drawn when the promise was made or not. It is an original promise, and not within the statute of frauds. *Townsley v. Sumrall*, 2 P. 170....viii. 68.

4. The facts that the payee knew the drawer had no funds in the hands of the drawee, and intended to apply the bill to pay a debt for which the drawer was also liable, do not affect the case. *Ib.*

5. A promise to accept, to amount to an acceptance, must apply to the particular bill alleged to be accepted, and describe it, in terms not to be mistaken. *Boyce v. Edwards*, 4 P. 111....ix. 22.

6. A general authority to draw cannot be treated as accepting the bills drawn under such authority; it must be declared on as a promise to accept, by the promisee or the party taking the bills on the faith of it. *Ib.*

7. The drawee is liable only for the rate of interest fixed by the law of the place on which the bill is drawn. *Ib.*

8. A factor who has accepted a bill drawn by his principal, and an accommodation drawer, and has funds of the principal in his hands when the bill comes to maturity, is bound to apply those funds to pay that bill. He cannot sue the drawers and maintain that he applied those funds to pay a bill subsequently drawn by his principal alone. *Brander v. Phillips*, 16 P. 121....xiv. 209.

9. If the drawer of a bill puts it in circulation, bearing a forged indorsement of the name of the payee, and the drawee accepts and pays to a *bonâ fide* holder for value, he cannot recover back the money paid; his acceptance is a conclusive acknowledgment that he has funds of the drawer, and against him he can charge the amount of the bill, because the drawer is estopped to deny the verity of the indorsement. *Hortsmann v. Henshaw*, 11 H. 177....xviii. 590.

10. It is not a defence to an action on a bill of exchange by an indorsee for value, against the acceptor, that the bill was drawn for work and labor done, and the acceptance made on the faith of the drawer's promise to make good certain defects in the work, which he had failed to do; though the indorsee had notice of these facts before he took the bill. *Arthurs v. Hart*, 17 H. 6... xxi. 338.

3. DRAWER OF BILL. (*Infra*, G. 5 ; AGENT L. 2.)

## 4. INDORSER.

1. A *bonâ fide* holder of a bill may write over a blank indorsement an order to pay to a particular person, before or after the institution of a suit. *Evans v. Gee*, 11 P. 80 . . . . xii. 344.

2. An indorser is liable to an action for non-acceptance ; going to trial on the merits is a waiver of a demurrer. *Ib.*

3. In the absence of any special contract, the first accommodation indorser has no claim on the second for any part of the money paid by the former to take up the note. *M'Donald v. Magruder*, 3 P. 470 . . . . viii. 491.

4. An accommodation indorser of a note negotiable in the Bank of Alexandria, is by force of the act of incorporation, liable to an action before the maker has been sued, and though he be solvent. *Yeaton v. Bank of Alexandria*, 5 C. 49 . . . . ii. 189.

5. If a person write his name on a blank piece of paper, with the intent to have it operate as an indorsement of a negotiable note, to obtain a loan for the benefit of a friend, who is to sign as maker, and the note be written and signed, and the loan made on the faith of it, the signature operates as an indorsement, and binds the indorser. *Violett v. Patton*, 5 C. 142 . . . . ii. 212.

6. Under the law of Virginia, an indorsee of a negotiable promissory note cannot maintain an action at law against his immediate indorser, without proof of insolvency of the maker, or of a suit against him, even if the maker resided out of the jurisdiction, and the indorser put his name on the note to give it credit with the plaintiff, and took security for his indemnity. *Dulany v. Hodgkin*, 5 C. 333 . . . . ii. 285.

7. By the law of Virginia, no promise is implied in favor of an indorsee, by any but his immediate indorser ; an action of assumpsit does not lie by an indorsee against a remote indorser, founded on the indorsement. *Mandeville v. Riddle*, 1 C. 290 . . . . i. 412.

8. Under the law of Virginia, the holder of a negotiable promissory note may maintain a bill in equity against a remote indorser, to recover its contents. *Riddle v. Mandeville*, 5 C. 322 . . . . ii. 281.

9. The right thus asserted, is the right of the indorsee who took the note from the defendant, and therefore any legal defence, valid as against such immediate indorsee of the defendant, is valid in equity as against the remote indorsee. *Ib.*

10. Under the statute of Virginia, giving to debts due on protested bills of exchange, the rank of judgment debts, a joint indorser, who has paid more than his proportion of the debt, has a right to satisfaction out of the assets of his co-indorser with the priority of a judgment creditor. *Lidderdale's Executors v. Robinson's Executor*, 12 W. 594 . . . . vii. 382.

11. Under the law of Kentucky, the assignor of a promissory note assumes to pay it, if, by legal process and due diligence, the assignee is unable to recover the amount from the maker. *Bank of the United States v. Tyler*, 4 P. 366 . . . . ix. 100.

11a. Rules of due diligence, under this law, stated. *Ib.*



12. It was not incumbent on the assignee to take an execution returnable on a rule day; and when the greatest time intervening between the date of an execution and placing it in the hands of the marshal, was thirty-one days, and from the return of one execution, or *venditioni exponas*, to the issuing of another, thirty days, this was due diligence. *Ib.*

13. The law of Kentucky requires the assignee to pursue the jailer and his sureties for an escape of the maker of a note, before resorting to the assignor. *Ib.*

14. If the indorser of a promissory note has been charged, by due notice of the default of the maker, the holder may proceed against either party at his pleasure, and does not discharge the indorser, by not issuing, or by countermanding an execution against the maker. *Lenox v. Prout*, 3 W. 520....iv. 277.

15. A mere agreement by the holder with the drawer for delay, without a consideration, and not communicated to the indorser, does not discharge the indorser. *M'LeMORE v. Powell*, 12 W. 554....vii. 353.

16. Though an indorser of a negotiable note may ordinarily be declared against in an action for money had and received, yet if the plaintiff's evidence shows that he was a mere accommodation indorser, this action will not lie; he can be charged only on a special count upon the note. *Page's Administrators v. Bank of Alexandria*, 7 W. 35....v. 209.

17. If the second of a set of exchange has been duly protested, the indorsee may recover thereon against the indorser, without producing the first of the set at the trial. *Downes v. Church*, 13 P. 205....xiii. 124.

18. An agreement between the first and second indorsers, for the accommodation of the maker, to share any loss equally, made at the time of indorsing the notes, may be proved by parol, has a valuable consideration in the mutual promises, and is binding. *Phillips v. Preston*, 5 H. 278....xvi. 396.

ASSUMPSIT, C. 10; ATTORNEY AND COUNSEL, B. 4, 5, 6; CONFLICT OF LAWS, C. 1.

## 5. DAMAGES.

1. If a foreign bill be indorsed in Virginia, and duly protested for non-payment, the indorser is liable to an action for fifteen per cent. damages; his contract being governed by the law of the place where it was made. *Slacum v. Pomery*, 6 C. 221....ii. 377.

2. Under the statute of Maryland, if a bill of exchange be paid, *supra protest*, for the honor of the payee, the first of three indorsers, who thereupon repays the amount of the bill, with interest and charges, to the person who took the bill for his honor, the payee thus becomes the holder of the bill, and may recover damages against the drawer. *Bank of the United States v. United States*, 2 H. 711....xv. 257.

3. Damages are allowed on bills as a compensation for not obtaining the money at the place stipulated, and not by way of a penalty. *Ib.*

*Supra*, A. 3; PROTEST, 2.

## H. TRANSFER OF, AND RIGHTS OF INDORSEE.

ADMIRALTY, A. 2; *Supra*, G. 4, 5; JURISDICTION, B. a. 4.

1. The mere possession of a promissory note by an indorsee, who has indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a reassignment or receipt from the last indorsee. *Welch v. Lindo*, 7 C. 159 . . . . ii. 496.

2. If the indorser of a bill come to the possession thereof, he is presumed to be the lawful holder; and this presumption is not removed by the fact that a special indorsement by him, to a third person, appears on the bill. *Dugan v. United States*, 3 W. 172 . . . . iv. 189.

3. The real payees of a negotiable note have the right to transfer it by indorsement; and if the name of another person, who never had any interest in the note, appears thereon as a payee, the fact may be shown, by evidence *aliundé*, that he was not a payee, and thus the title of the indorsee will be supported. *Pease v. Dwight*, 6 H. 190 . . . . xvi. 649.

4. The *bonâ fide* holder of a bill of exchange who has taken it before its maturity, in payment of a preëxisting debt, without notice of any equities existing between the drawer and acceptor, is not affected by those equities. *Swift v. Tyson*, 16 P. 1 . . . . xiv. 166.

5. A note made payable to the cashier of a bank, and drawn in a particular form to be within its usages, was sent to an agent to procure a discount at the bank; the bank having refused the discount, the agent sold the note, and applied the proceeds to his own use. *Held*, that the note, on its face, showed the particular purpose for which it was made, and put a taker on inquiry, and he could not recover, though in fact he had not knowledge of the fraud. *Fowler v. Brantly*, 14 P. 318 . . . . xiii. 476.

6. A bill protested for non-acceptance, is taken, subject to all the infirmities belonging to it. *Andrews v. Pond*, 13 P. 65 . . . . xiii. 42.

7. The *bonâ fide* indorsee of a negotiable note is not barred from recovering thereon under the law of Mississippi, by the resale of the property which formed the consideration, by the vendee to the vendor, nor by the redemption of it under a conditional sale, for which the note was the consideration. *Brabston v. Gibson*, 9 H. 263 . . . . xviii. 136.

8. In Alabama, the law merchant governs negotiable notes payable at a bank, and therefore an indorsee for value, without notice, and before maturity, takes the paper discharged from any infirmity of want of consideration. *Smyth v. Strader*, 4 H. 404 . . . . xvi. 157.

9. A note payable to bearer is payable to anybody, and is not affected by the disability of the nominal payee to sue. *Bank of Kentucky v. Wister*, 2 P. 318 . . . . viii. 123.

## I. ALTERATION. (ERASURE AND INTERLINEATION.)

## J. PAYMENT AND WHEN PAYABLE.

A time bill, not presented for acceptance, is not payable till the last day of grace. *Bank of Washington v. Triplett*, 1 P. 25 . . . . vii. 433.

## K. WHEN RECEIVING A BILL OR NOTE AMOUNTS TO PAYMENT.

1. If the vendee of goods indorse to the vendor a negotiable note of a third person, as a conditional payment for the goods, and the vendee uses due diligence to obtain payment of the note from the maker, he may then sue the vendee on the original contract of sale. *Clark v. Young*, 1 C. 181....i. 392.

2. It is not necessary first to tender the note to the vendor. *Ib.*

3. Nor is a judgment in favor of the indorser, in an action by the indorsee, a bar to an action on the contract of sale. *Ib.*

4. If a negotiable note has been received as a conditional payment, and has been passed to, and is owned by a third person, the creditor cannot sue on the original contract. *Harris v. Johnston*, 3 C. 311....i. 592.

5. If a negotiable note of one joint debtor be received in payment, the debt is extinguished. *Sheehy v. Mandeville*, 6 C. 253....ii. 391.

6. The acceptance of a negotiable note for an antecedent debt does not extinguish it, unless it is agreed the note shall operate as a payment. *Peter v. Beverley*, 10 P. 532....xii. 234.

7. In an action to recover the consideration of a sale and conveyance of real and personal property, for which three notes were given, two of which were admitted to have been paid, and the third was produced and tendered to be given up; *Held*, 1. That the other notes need not be produced; 2. That, as defendants gave their notes for the purchase-money, the presumption was that the conveyances had been made, and the deeds need not be produced; 3. That there was no presumption that the notes were received in satisfaction of the purchase-money. *Lyman v. Bank of the United States*, 12 H. 225....xix. 115.

## BILLS OF CREDIT.

CONSTITUTIONAL LAW, Q.

## BILLS OF DISCOVERY.

DISCOVERY.

## BILLS OF EXCEPTIONS.

EXCEPTIONS.

## BILLS OF LADING.

SHIPPING, D.

## BILLS OF PARTICULARS.

## EXCEPTIONS.

A bill of particulars, which apprises the defendants of the amount and substantial ground of the claim, is good. *Chesapeake and Ohio Canal Company v. Knapp*, 9 P. 541 . . . . xi. 476.

## BILLS OF PEACE.

LAWS OF THE SEVERAL STATES, B. 7.

## BILLS OF REVIEW.

EQUITY, B. b. 4, C. 8; JUDGMENTS, &c. B. 8.

1. There is no statute expressly limiting bills of review; but the courts of the United States are governed in this particular by the analogous limitation of the right of appeal, and therefore a bill of review cannot be filed after the lapse of five years from the final decree. *Thomas v. Harvie's Heirs*, 10 W. 146 . . . . vi. 357.

2. If such a bill can be allowed to be filed, after the expiration of that time, for an error not previously known, the complainant can assign no other error, and if that be not sufficient to reverse the decree, the bill must be dismissed. *Ib.*

3. A bill in the nature of a bill of review lies before enrolment of the decree; a bill of review, after enrolment; and in our practice, a decree is deemed to be enrolled at the close of the term when it was made. *Whiting v. Bank of the United States*, 13 P. 6 . . . . xiii. 4.

4. An original bill, in the nature of a bill of review, brings up interests of those not parties to the suit, nor their privies in representation. *Ib.*

5. A bill may present such facts as to make it a compound bill of review, of supplement, and revivor. *Ib.*

6. A bill of review must be founded on some error apparent on the bill, answer, and other pleadings and decree; and the complainant cannot go into the evidence at large, to establish an objection that the court deduced wrong conclusions of fact from the proofs. *Ib.*

7. Non-joinder of a party is not ground for a review, unless the complainant sustained some injury thereby. *Ib.*

8. A decree of foreclosure and sale is final upon the merits of the controversy; an appeal lies therefrom; therefore a bill of review will not lie after the lapse of five years from such decree; and the non-revival of the suit, upon the death of the respondent after such a decree, is not error. *Ib.*

9. Whether certain evidence, alleged to be newly discovered, would authorize a bill of review. *Southard v. Russell*, 16 H. 547 . . . . xxi. 296.

10. Merely impeaching the character of a material witness is not sufficient. *Ib.*

11. For errors in law, on the face of the decree of an appellate court, a bill of review does not lie. *Ib.*

12. Nor for any cause, after an appeal, without leave of the appellate court. *Ib.*

13. A bill which states that the complainant had an interest in the subject-matter of a former suit in equity, applied to be admitted a party, was refused, and a decree made in fraud of his rights, and praying to have that decree set aside, &c., is an original bill, and not a bill of review, and the complainant must be competent to sue all the defendants. *Wickliffe v. Eve*, 17 H. 468 . . . . xxi. 616.

14. On a bill of review, the court has power to set aside a conveyance executed under the original decree. *Bank of the United States v. Ritchie*, 8 P. 128 . . . . xi. 46.

## BILLS OF SALE AND OF PARCELS.

### CONTRACT, A; EVIDENCE, F.

A bill of sale, which contains only stipulations of the vendor, is not a cynalagmatic contract under the laws of Louisiana. *Zacharie v. Franklin*, 12 P. 151 . . . . xii. 670.

## BLOCKADE.

1. An intention to enter a blockaded port is not a breach of blockade; there must also be an attempt to enter, knowing the fact of blockade. *Fitzsimmons v. Newport Ins. Co.* 4 C. 185 . . . . ii. 65.

2. Where orders had been given to the blockading force not to capture a vessel, unless previously warned not to enter, the master is not bound to make inquiries elsewhere, but may sail for the port, expecting to inquire of the blockading squadron, if there. *Maryland Ins. Co. v. Woods*, 6 C. 29 . . . . ii. 310.

3. Notice from the British government, that a blockade will not be considered as existing without an actual investment, and that vessels bound to an invested port will not be captured, unless previously warned off, justifies the master of an American vessel who has been warned off, but has, subsequently, reasonable ground to believe the blockade has ceased, in returning to make inquiry off the port, intending to proceed elsewhere if the blockade still continues. *Maryland Ins. Co. v. Wood*, 7 C. 402 . . . . ii. 592.

### CAPTURE, G. 1, 2.

## BOND.

INTEREST, B; PAYMENT, C.

A. FORM, EXECUTION, ACCEPTANCE, ALTERATION, ASSIGNMENT, AND WHO MAY SUE THEREON, 64.

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C. OFFICIAL BONDS, 65.

1. VALIDITY.

2. WHAT COVERED BY SUCH A BOND.

3. DISCHARGE OF SURETIES.

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F. OTHER STATUTE BONDS, 69.

G. PENALTIES -AND THEIR REDUCTION, AND FOR WHAT JUDGMENTS SHOULD BE RENDERED, 69.

H. DECLARATION AND PLEADINGS, 69.

A. FORM, EXECUTION, ACCEPTANCE, ALTERATION, ASSIGNMENT, AND WHO MAY SUE THEREON.

1. Proof of the signature of one of the parties, to a joint and several bond, is sufficient to make title as against him. *Conard v. Atlantic Insurance Company of New York*, 1 P. 886....vii. 637.

2. If a bond, drawn to be executed by two sureties, be signed by only one, and by him be delivered as an escrow, to operate as his deed when the other shall have signed and delivered it, he is not bound until such signature and delivery by the other surety,—*aliter*, if the first who signs delivers it as his deed. *Duncan's Heirs v. United States*, 7 P. 435....x. 585.

3. A bond cannot be delivered to one of the obligees as an escrow. *Moss v. Riddle*, 5 C. 351....ii. 290.

4. If an appeal bond executed by the appellant and one surety be rejected by a justice of the peace, and afterwards, without the privity of the principal obligor, the bond is altered by interlining the name of another surety, who executes it, the plea of *non est factum*, by the principal obligor,<sup>a</sup> is supported. *Oneal v. Long*, 4 C. 60....ii. 18.

5. A bond, in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable, under the statute of Virginia. *Lewis v. Harwood*, 6 C. 82....ii. 325.

6. A bond is not avoided by erasing the name of one obligor, and inserting the name of another after delivery, by consent of all parties, proved by parol. *Speake v. United States*, 9 C. 28....iii. 242.

7. A bond by a deputy collector of taxes, with sureties, reciting his appointment for eight townships, and conditioned for the faithful discharge of the duties "of the said appointment," is avoided as against the sureties by an interlineation

of the name of another township, so as to make it an appointment for nine instead of eight, without the consent of the sureties. *Miller v. Stewart*, 9 W. 681.... vi. 233.

8. No person who is not the obligee of a bond or its assignee, can put it in suit, unless authorized so to do by the legislature. It is not enough that a breach of the bond has damnified the person who brings the suit. *Corporation of Washington v. Young*, 10 W. 406....vi. 455.

9. Bonds, being negotiable by the law of Florida, an assignee of a joint and several bond may sue in his own name one of the obligors, though another obligor was also an obligee. *Bradford v. Williams*, 4 H. 576....xvi. 205.

10. Though no perfect delivery could be made by the obligee of the bond of him who was both obligor and obligee, yet it became perfect when with his assent it was assigned and delivered to the assignee. *Ib.*

11. The law of Florida, which gives the same rights and powers to the assignee as the obligee possessed, refers to substantial defences, not to merely technical defects. *Ib.*

BANKS, 18; *Infra*, H. 1.

## B. CONSTRUCTION.

1. The real intent, and not the literal meaning of a condition, is to govern. *Cooke v. Graham's Adm.* 3 C. 229....i. 565.

2. An official bond of a paymaster, executed at New Orleans, is governed by the common law. *Duncan's Heirs v. United States*, 7 P. 435....x. 535.

3. Under a marshal's bond, the cause of action does not accrue to a party plaintiff, whose judgment the marshal fails to satisfy, until the final judgment has been rendered, though he may have before that time wrongfully used money in his hands bound for the judgment. *Montgomery v. Hernandez*, 12 W. 129.... vii. 81.

4. Under a bond to remain a true prisoner until lawfully discharged, a discharge under a resolve of the legislature, passed in conformity with an ancient usage thus to relieve from imprisonment, is a lawful discharge, and does not impair the obligation of the contract. *Mason v. Haile*, 12 W. 370....vii. 227.

5. A bond, with sureties, to account for all advances made under a certain contract, does not apply to, or cover advances made on account of that and another contract, indiscriminately. *United States v. Jones*, 8 P. 399....xi. 140.

6. Construction of a bond executed by persons who were the president and directors of the Bank of Somerset, to the United States, for the performance of an agreement made by the bank with the United States, for the payment of a debt due to the United States, arising from deposits made in the bank, for account of the United States. *United States v. Robertson*, 5 P. 641....ix. 507.

## C. OFFICIAL BONDS (RECEIVERS OF PUBLIC MONEY.)

### 1. VALIDITY.

1. The postmaster-general has power to take a bond from a postmaster for the payment of moneys received by him in his official capacity. *Postmaster-General of the United States v. Early*, 12 W. 136....vii. 86.



2. Including in an official bond other things which are separable from the subjects for which it may lawfully be taken, does not necessarily vitiate it. *Ib.*

3. A bond given to the United States by a paymaster and his sureties, one part of the condition being in conformity with the act of congress which directed bonds to be taken from paymasters, held valid in that part, though it also contained other stipulations not required by the act, these latter being distinct and separable from the former, and it not appearing that any compulsion was used to obtain the bond. *United States v. Bradley*, 10 P. 343....xii. 155.

4. There is no difference between a bond, invalid in part by statute, and one invalid in part by the common law, unless the statute declares the whole bond void. *Ib.*

5. A bond, voluntarily given by a disbursing officer and his sureties to the United States, through the proper department, to secure the faithful performance of his duties, is a valid contract, though the taking of such a bond may not be prescribed by any act of congress. *United States v. Tingey*, 5 P. 115....ix. 248.

6. But no officer of the government has the right to require from any subordinate officer, as a condition for his holding office, that he should execute a bond with a condition different from that prescribed by law ; and a bond thus obtained is illegal and void. *Ib.*

7. A surety on a collector's bond, died, after the bond had been signed and sealed by the obligors, and after it had been put in course of transmission to the comptroller of the treasury, but before it had been approved, or appeared to have been received by him. *Held*, that the surety was bound. *Broome v. United States*, 15 H. 143....xx. 445.

*Supra*, A. 7 ; CONTRACT, A. 7.

## 2. WHAT COVERED BY SUCH A BOND.

1. Sureties are not liable for past defaults unless made so in terms. *Farrar v. United States*, 5 P. 373....ix. 386.

2. A resolution to suspend a cashier does not remove him from office ; and for any defaults by him after the resolution, and before he is actually removed, his sureties are responsible. *M Gill v. Bank of the United States*, 12 W. 511....vii. 320.

3. The sureties of a collector of customs are responsible for moneys handed over to him by his predecessor in office, and for those transmitted to him by another collector to enable him to pay expenses, which he is required, officially, to disburse. *Broome v. United States*, 15 H. 143....xx. 445.

4. If a marshal, before the date of his official bond, receive, upon an execution, money due to the United States, with orders from the comptroller to pay it into the Bank of the United States, which he neglects to do, the sureties in his official bond, executed afterwards, are not liable therefor upon the bond, although the money remain in the marshal's hands after the execution of the bond. *United States v. Giles*, 9 C. 212....iii. 339.

5. An official bond, given by a collector of internal taxes, with sureties, conditioned for the discharge of his duties according to law, does not cover duties

created by laws subsequently enacted. *United States v. Kirkpatrick*, 9 W 720....vi. 244.

6. An appointment and commission of such a collector, "until the end of the next session of congress, and no longer," is not continued by a new appointment and commission during the pleasure of the President; the latter is a distinct appointment, and requires a new bond. *Ib.*

7. Where an act requires a bond to be taken with a condition for the faithful disbursement of public money, and also for the faithful discharge of duty, and the former is omitted from the condition, *quære*, whether the latter can be shown by proof to cover it. *Farrar v. United States*, 5 P. 373....ix. 386.

8. Where a bond was given by the agent of an unincorporated joint-stock company, to the directors, for the faithful performance of his duties, &c., while he held the office, and the directors were appointed annually, and changed before a breach of the condition of the bond, the agent and his sureties were held liable to an action brought by the obligees after they had ceased to be directors. *Anderson v. Longden*, 1 W. 85....iii. 475.

#### BANKS, 14-18.

### 8. DISCHARGE OF SURETIES.

1. A private act of congress for the relief of a debtor of the United States, which retains the right to proceed against his property subsequently acquired, does not release his surety. *Hunter v. United States*, 5 P. 173....ix. 271.

2. Sureties are not discharged by the omission of the government officers to enforce the law as to periodical accounting; laches not being imputable to the United States. *United States v. Kirkpatrick*; 9 W. 720....vi. 244.

3. The provisions of law requiring periodical settlements by officers, are directory merely, and form no part of the contract with the surety. *United States v. Vanzandt*, 11 W. 184....vi. 553.

4. Laches is not imputable to the United States by a surety on an official bond. *Ib.*

5. Laches in proceeding against a debtor of the United States, does not release his sureties. *Smith T. v. United States*, 5 P. 292....ix. 347.

6. Laches of the officers of the United States does not of itself discharge sureties on an official bond. *Dox v. Postmaster-General of the United States*, 1 P. 318....vii. 596.

7. No presumption of payment of such a bond arises from the lapse of a little more than five years. *Ib.*

8. Under the act of April 30, 1810, § 29, (2 Stats. at Large, 602,) though the postmaster-general is made liable for sums due from delinquent postmasters, if he does not cause a suit to be instituted within six months after a default, yet neither the postmaster nor his sureties are discharged by such omission to sue. *Ib.*

9. A discharge, by the secretary of the treasury, of the principal debtor taken on a *ca. sa.* pursuant to the act of June 6, 1798, (1 Stats. at Large, 561,) does not release his sureties from the judgment, nor operate as a satisfaction thereof. *United States v. Stansbury*, 1 P. 573....vii. 704.

10. The act of May 15, 1820, (3 Stats. at Large, 592,) does not discharge

sureties on their existing bonds, though it requires new sureties to be given. *United States v. Nicholl*, 12 W. 505 . . . .vii. 315.

11. The taking of collateral security without suspending the original cause of action does not discharge a surety. *Ib.*

BANKS, 15-17 ; *Infra*, G. 3.

#### D. PRISON BONDS.

A departure from prison rules, under the authority of a judgment of a competent tribunal, obtained by the fraud of the debtor alone—his sureties being innocent—is not a breach of a bond conditioned that he would not depart until discharged by due course of law. *Simms v. Slacum*, 3 C. 300 . . . .i. 587.

#### E. ERROR, APPEAL, INJUNCTION, AND FORTHCOMING BONDS.

APPEAL, B. ; ERROR, C. ; JUDGMENTS, &c. B. 1.

1. An appeal-bond, conditioned that the obligees will pay all costs and damages which they may be adjudged to pay by reason of the appeal, being broken, and the question of the extent of their liability submitted to the court on an agreed case, *held*, 1. That the proceeds of property attached in the suit were not to be applied *pro rata* to the original judgment and to the enhanced damages and costs by reason of the appeal, but that the former should be first fully paid. 2. That the equitable power of the court to reduce the penalty does not exist in a case submitted on an agreed statement of facts. 3. That as the whole amount of the penalty of the bond and interest thereon from the date of the writ in this suit, did not exceed what remained due to the obligor, after applying the proceeds of the property attached as above mentioned, the obligees were liable to a judgment for such penalty and interest. *Ives v. Merchants Bank of Boston*, 12 H. 159 . . . .xix. 80.

2. The 6th section of the act of the 29th of April, 1802, (2 Stats. at Large, 163,) transferred the jurisdiction over forthcoming bonds given in suits pending in the courts abolished by that act. *Stuart v. Laird*, 1 C. 299 . . . .i. 414.

3. Where a forthcoming bond taken upon an execution, recited the aggregate sum of the execution correctly, but stated one of the items at \$20.33 instead of \$12.33, it was held correct in substance. The judgment of the court below thereon for the plaintiff was affirmed, with ten per cent. damages and costs. *Williams v. Lyles*, 2 C. 9 . . . .i. 427.

4. If the original judgment be reversed, the reversal of the dependent judgment on the "forthcoming bond" follows, of course; but a special *certiorari* is necessary to bring up the execution upon which the bond was given, so as to show the connection between the two judgments. *Barton v. Petit*, 7 C. 288. . . . .ii. 533.

5. A notice of a motion for an execution under a forthcoming bond, by the law of Virginia, is not inoperative because it describes the writ of *fi. fa.*, as issued against the judgment-debtor who gave the bond, when in fact it was against him and another. *Alexander v. Brown*, 1 P. 683 . . . .vii. 768.

6. An injunction bond in Louisiana was conditioned to pay "all such dam-

ages as the obligee may recover against us," this being the usual form under the state practice, where if the injunction is dissolved, the court proceeds to assess the damages, and decrees their payment by the principal and sureties in such a bond. *Held*, 1. That state practice was inapplicable to a case in equity. 2. That no decree could be made against the sureties. 3. That as none had been made, the condition of the bond was not broken, and no action at law would lie thereon. *Bein v. Heath*, 12 H. 168....xix. 86.

#### F. OTHER STATUTE BONDS.

1. If a statute direct a bond to be taken before a clearance granted, one taken afterwards is not necessarily invalid. *Speake v. United States*, 9 C. 28....iii. 242.

2. Where the law requires a bond in a penal sum, equal to double the value of the vessel, both parties are estopped, in the absence of fraud, oppression, and circumvention, from denying that the penal sum, inserted by mutual consent, was in fact double that value. *Ib.*

3. Though an executor of an administrator, who is also administrator *de bonis non* of the intestate, is responsible as executor under the law of Maryland, for assets of the intestate which the executor had collected, and is not responsible therefor as administrator *de bonis non*, yet if he render an account of them to the orphans' court for the District of Columbia, as administrator *de bonis non*, and subsequently, that court, under the act of February 20, 1846, § 3, (9 Stats. at Large, 4,) compels him to give further security by bonds, his sureties, upon the further bonds, so taken, are liable for what was thus shown by his accounts to be in his hands as administrator *de bonis non*. *Ennis v. Smith*, 14 H. 400....xx. 251.

#### G. PENALTIES AND THEIR REDUCTION, AND FOR WHAT JUDGMENTS SHOULD BE RENDERED.

1. Sureties are discharged from the penalty of their bond only on payment of the principal, interest, and costs. *M'Gill v. Bank of the United States*, 12 W. 511....vii. 320.

2. The 26th section of the judiciary act, (1 Stats. at Large, 87,) does not apply to a case of judgment on a verdict, but only to judgments upon demurrer, or by default or confession. *Farrar v. United States*, 5 P. 373....ix. 386.

3. Against sureties on an official bond, judgment cannot be rendered beyond the penalty, to be discharged on payment of what is actually due. *Ib.*

*Supra*, E. 1; PRIVATEER, 2, 3.

#### H. DECLARATION AND PLEADINGS. (PLEADING, C.)

1. In a declaration on a bond conditioned to prosecute with effect an action of replevin, it is a sufficient assignment of a breach, that "the suit was not prosecuted with effect." *Gorman v. Lenox's Executors*, 15 P. 115....xiv. 44.

2. In Mississippi, any number of breaches may be assigned, in a replication to a plea of general performance of the condition of a bond. *United States v. Boyd*, 15 P. 187....xiv. 68.

3. A plea by one of several defendants in an action of debt on bond, that it was materially altered after its delivery, without his consent, but not averring the alteration was made by the plaintiff, or with his privity, is bad on demurrer. *United States v. Linn*, 1 H. 104....xiv. 510.

4. A replication to a plea of general performance, in an action on a bond, should assign a special breach; but, after verdict, the omission to do so cannot be taken advantage of. *Minor v. Mechanics' Bank of Alexandria*, 1 P. 46....vii. 445.

## BOTTOMRY AND RESPONDENTIA.

A. WHAT VALID OR OTHERWISE, 70.

B. HOW LIEN LOST OR DISPLACED, 70.

C. WHOM IT BINDS AND WHAT ARE ITS EFFECTS, 71.

### A. WHAT VALID OR OTHERWISE.

1. To support a bottomry bond, given by the master, it must appear that the advances were made for repairs or supplies, necessary for effectuating the objects of the voyage, or the safety of the ship, and that they could not have been obtained on the credit of the owner. *The Aurora*, 1 W. 96....iii. 477.

2. The borrower, upon *respondentia*, has a right to apply the money lent as he pleases; it does not vitiate the bond, that its proceeds were applied to pay a prior loan. *Conard v. Atlantic Insurance Company of New York*, 1 P. 386....vii. 637.

3. A *respondentia* loan, made during a voyage, is legal. If the risk is taken for the whole voyage, it is like that assumed by underwriters, who insure "lost or not lost." *Ib.*

4. A bottomry bond may be good in part and bad in part, and will be upheld by a court of admiralty to the extent to which it is valid. *The Virgin*, 8 P. 538....xi. 208.

5. If the supplies and advances were necessary, it is incumbent on the owner to prove they could have been obtained on his personal credit. *Ib.*

6. The non-existence of funds, and the inability of the master to get at them, are equally valid causes for a bottomry. *Ib.*

7. A bottomry bond, given by the master after the advances had all been made, is valid, provided they were made with an understanding that such a bond would be given. *Ib.*

### B. HOW LIEN LOST OR DISPLACED.

1. If the holder of a bottomry bond omits to enforce it, until the vessel has made another voyage, after the completion of the voyage mentioned in the bond,

an execution levied on the vessel, before it has been arrested upon admiralty process to enforce the bond, displaces the bottomry lien. *Blaine v. Ship Charles Carter*, 4 C. 328 . . . .ii. 125.

2. If there be a stipulation for bottomry when the advances are made, it must be understood in reference to the then next voyage; and if the bond be not taken, and that voyage is made, it is waived. *The Aurora*, 1 W. 96 . . . .iii. 477.

3. A creditor who advances his money in good faith to relieve the ship from an actual arrest for repairs and supplies constituting a lien by the marine law, may stipulate for a bottomry bond; but a mere threat of arrest by a general creditor is not sufficient. *Ib.*

4. If different claims are embraced in such a bond, some of which would and some would not support it, it is the duty of the creditor clearly to distinguish them, and show their respective origin and character. *Ib.*

5. A second bond, including what was due upon an original invalid bond, cannot be supported for that amount. *Ib.*

6. If the master changes his voyage, without any participation or fraudulent intent of the bottomry lender, the security is not thereby invalidated. *The Virgin*, 8 P. 538 . . . .xi. 208.

#### C. WHOM IT BINDS AND WHAT ARE ITS EFFECTS.

A bottomry bond does not make the owners, personally, debtors. *The Virgin*, 8 P. 538 . . . .xi. 208.

INSURANCE, F. 25.

### BOUNDARY.

FOR BOUNDARIES OF PUBLIC LANDS AND GRANTS THEREOF, *see* PUBLIC LANDS; *see also* RIVERS.

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B. BETWEEN STATES, 71.

C. INDIAN BOUNDARIES, 72.

#### A. BETWEEN PRIVATE LANDHOLDERS.

DEED, F.; ESTOPPEL, C. 4, 5.

#### B. BETWEEN STATES. (CONSTITUTIONAL LAW, D. 1; STATES, A. 1.)

1. The boundary of the State of Kentucky does not include a peninsula, or island, on the western or northwestern bank of the Ohio, separated from the main land by a channel, or bayou, which is filled with water only when the river rises above its banks, and is, at other times, dry. *Handly's Lessee v. Anthony*, 5 W. 374 . . . .iv. 667.

2. The history of the jurisdiction exercised by the United States west of the Mississippi River examined, and a decree made, fixing the boundary between the States of Missouri and Iowa. *Missouri v. Iowa*, 7 H. 660 . . . .xvii. 337.

3. The commissioners appointed by a decree of this court, 7 How. 660, to run and mark the boundary line between the States of Missouri and Iowa, having made their report, it was accepted, without objection by either party, and the line established in conformity therewith. *Missouri v. Iowa, Iowa v. Missouri*, 10 H. 1 . . . . xviii. 294.

4. Construction of an act of commissioners establishing part of the western boundary of Georgia on the west bank of the Chattahoochee River. *Howard v. Ingersoll*, 13 H. 381 . . . . xix. 542.

COMPACTS OF STATES, 12, 13; EQUITY, B. g. 2; JURISDICTION, A. a. 8.

### C. INDIAN BOUNDARIES.

1. A question of disputed boundary may be settled by the United States and an Indian tribe, between whom a previous treaty had been made, which left the boundary in some respects uncertain; and private rights are bound thereby. *Lattimer's Lessee v. Poteet*, 4 P. 4 . . . . xiii. 306.

2. The boundaries of the Indian country in North Carolina determined. *Id.*

### BURDEN OF PROOF.

EVIDENCE, B.; REVENUE LAWS, F. 2.

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### CAPTURE.

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#### A. JURISDICTION TO TRY.

ADMIRALTY, A. 1; JURISDICTION, C. 2; LAW OF NATIONS, B.

### B. WHAT AMOUNTS TO, AND WHAT IS OR NOT AN ABANDONMENT THEREOF.

1. In order to constitute a capture, some act should be done indicative of an intention to seize and to retain as prize; it is sufficient if such intention is fairly to be inferred from the conduct of the captor. *The Grotius*, 9 C. 368....iii. 384.

2. Capture not abandoned, though only a prize-master put on board, the crew being Americans. *The Alexander*, 8 C. 169....iii. 78.

*Infra*, D. 1-6.

#### C. RIGHTS AND POWERS OF CAPTORS. (SALVAGE, C.)

1. The modern usages of war authorize the bringing one of the principal officers of the vessel detained, on board the belligerent vessel, with the papers for examination. *The Eleanor*, 2 W. 345....iv. 129.

2. Whether the capture is made by a duly commissioned captor or not, is a question between the government and the captor, with which the claimant has nothing to do. *The Amiable Isabella*, 6 W. 1....v. 1.

3. If the capture be made by a non-commissioned captor, the government may contest the right of the captor after a decree of condemnation, and before a distribution of the prize proceeds. *Ib.*

4. All captures *jure belli* are made for the government. *The Dos Hermanos*, 10 W. 306....vi. 412.

5. If by a non-commissioned captor, the condemnation must be to the government. *The Amiable Isabella*, 6 W. 1....v. 1. *The Dos Hermanos*, 2 W. 76....iv. 31.

6. He can only receive a compensation in the nature of salvage. *The Dos Hermanos*, 10 W. 306....vi. 412.

7. The Prize Act of 26th June, 1812, (2 Stats. at Large, 759,) operates as a grant from the United States, to the captors, of all property rightfully captured by commissioned privateers, as prize of war. *The Sally*, 8 C. 382....iii. 182.

8. Where an enemy's vessel was captured by a private armed vessel of the United States, and subsequently dispossessed by the force or terror of another vessel of the United States, the prize was, under the circumstances of the case, adjudged to the first captor, with costs and damages. *The Mary*, 2 W. 123....iv. 56.

9. An enemy's vessel was captured by a privateer, recaptured by another enemy's vessel, and again recaptured by another privateer, and brought in for

adjudication. It was held that the prize vested in the last captor. *The Astrea*, 1 W. 125 . . . .iii. 489.

9a. An interest acquired in war, by possession, is divested by the loss of possession. *Ib.*

10. Captors may subject the property captured to forfeiture for a violation of municipal law, even as against the original owner. *The Josefa Segunda*, 5 W. 338 . . . .iv. 654.

11. Condemnation, subject to an appeal, is not final, and so not definitive, within the meaning of our treaty with France of the 21st of December, 1801. *United States v. Schooner Peggy*, 1 C. 103 . . . .i. 358.

#### SALES, A. 12.

### D. DUTIES AND LIABILITIES OF CAPTORS AND THEIR AGENTS AND OF OWNERS OF PRIVATEERS.

#### ADMIRALTY, C. b. 1.

1. Irregularities on the part of the captors, originating from mere mistake, or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their rights of prize. *The Anne*, 3 W. 435 . . . .iv. 253.

2. Whenever an officer seizes a vessel as prize, he is bound to commit her to the care of a competent prize-master and crew; not because the original crew, when left on board, (in the case of a seizure of the vessel of a citizen or neutral,) are released from their duty without the assent of the master, but from the want of a right to subject the captured crew to the authority of the captor's officer. *The Eleanor*, 2 W. 345 . . . .iv. 129.

3. But this rule does not extend to the case of a mere detention for examination, which the commander of the cruising vessel may enforce by orders from his own quarter-deck, and may, therefore, send an officer on board the vessel detained, in order more conveniently to enforce it, without taking the vessel out of the possession of her own officers and crew. *Ib.*

4. Though it is the duty of the captor, under the laws of nations affirmed by the act of congress, to send in captured property for adjudication by a court of his own country, having competent jurisdiction, yet he may be excused, by imperative circumstances, for making a sale of such property, and afterwards seasonably subjecting the proceeds to the jurisdiction of a proper court of prize. *Jecker v. Montgomery*, 13 H. 498 . . . .xix. 615.

5. The orders of the commander in chief, not to weaken his force by detaching an officer and crew for the prize; or his own deliberate and honest judgment, exercised in reference to all the circumstances, that the public service does not permit him to make such detachment, will excuse the captor from sending in his prize for adjudication. *Ib.*

6. If no sufficient excuse appear, or if the captor have unreasonably delayed to bring the question of prize or no prize to an adjudication, the court may refuse to proceed to an adjudication, and may award restitution, with or without damages, upon the ground of forfeiture of rights by the captor, although his seizure was originally lawful. *Ib.*

7. So if the captor should neglect to proceed at all, the court may, upon a

libel filed by the owner, for a marine trespass, grant a monition to proceed to adjudication in a court of prize, or refuse it, and at once award damages. *Ib.*

8. In this case, the captor was held to have forfeited no rights, and an order to proceed in a court of prize, within whose jurisdiction were the proceeds of the sale of the property, was directed to be made by the circuit court. *Ib.*

9. The commander of a squadron is liable to individuals for the trespasses of those under his command, in case of positive or permissive orders, or of actual presence and coöperation. *The Eleanor*, 2 W. 345....iv. 129.

10. Where a capture has actually taken place, with the assent, express or implied, of the commander of a squadron, the prize-master may be considered as a bailee to the use of the whole squadron, who are to share in the prize-money, and thus the commander may be made responsible; but not so as to mere trespasses, unattended with a conversion to the use of the squadron. *Ib.*

11. The commander of a single ship is responsible for the acts of those under his command; as are, likewise, the owners of privateers for the conduct of the commanders appointed by them. *Ib.*

12. If an unlawful seizure is made by a public armed vessel upon the high seas, without probable cause, and the vessel seized is afterwards captured by a belligerent, and condemned as lawful prize, being actually neutral property, the seizer is liable to make restitution in value, with damages; and the neutral owner is not bound to appear and defend in the prize court. *Maley v. Shattuck*, 3 C. 458....i. 642.

13. Prize agents, who receive the proceeds of sales of prizes, and pay them over to the captors without an order of the court, are responsible to the owners of the captured property for the net amounts so received by them, in case restitution is decreed. *Hills v. Ross*, 3 D. 331....i. 247.

14. The owners of a privateer are responsible to all concerned, for the conduct of their agents, the officers and crew of the privateer. The measure of that responsibility is the full value of the property injured or destroyed. *Del Col v. Arnold*, 3 D. 333....i. 248.

15. On an illegal seizure, the original wrongdoers may be made responsible beyond the loss actually sustained, in a case of gross and wanton outrage; but the owners of the privateer, who are only constructively liable, are not bound to the extent of vindictive damages. *The Amiable Nancy*, 3 W. 546....iv. 287.

16. An item for loss by deterioration of the cargo, not occasioned by the improper conduct of the captors, rejected. *Ib.*

17. The prime cost or value of the property lost, and, in case of injury, the diminution in value by reason of the injury, with interest thereon, affords the true measure for estimating damages in such a case. *Ib.*

18. An item for the ransom of the vessel and cargo, which had been subsequently seized by another belligerent, (as alleged for want of papers of which the vessel had been deprived by the first captors,) rejected under the particular circumstances of the case. *Ib.*

19. A suit by the owners of captured property, lost through the fault and negligence of the captors, for compensation in damages. The value of the captured vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, where it has been paid, allowed in ascertaining the damages. *The Anna Maria*, 2 W. 327...iv. 122.

*Infra*, F. 27, 28.

### E. CAPTURES IN VIOLATION OF OUR NEUTRALITY OR OF A PIRATICAL CHARACTER.

ADMIRALTY, A. 2; EVIDENCE, B. 1.

1. The capture of a vessel of a country at peace with the United States, made by a vessel fitted out in one of our ports, and commanded by one of our citizens, is illegal, and if the captured vessel is brought within our jurisdiction, the district courts, upon a libel for a tortious seizure, may inquire into the facts, and decree restitution; and if a privateer, duly commissioned by a belligerent, collude with a vessel so fitted out and commanded, to cover her prizes and share with her their proceeds, such collusion is a fraud on the law of nations, and the claim of the belligerent will be rejected. *Talbot v. Janson*, 3 D. 133 . . . .i. 128.

2. Damages for the tortious seizure, as well as restitution, decreed. *Id.*

3. A capture of Spanish property, by a vessel built, armed, equipped, and owned in the United States, is illegal, and the property, if brought within our territorial limits, will be restored to the original owners. *La Conception*, 6 W. 235 . . . .v. 72.

4. Where a transfer of the capturing vessel to a citizen of a belligerent state, under whose flag and commission she sails on a cruise, is set up in order to legalize the capture, the sale must be proved. *Id.*

5. A citizen of this country who has made a capture on the high seas, in violation of the laws of the United States, cannot be allowed to claim as a captor in our courts, though he acted under a commission from a foreign belligerent power. *The Bello Corrunes*, 6 W. 152 . . . .v. 44.

6. If a capture be made by a privateer, which had been illegally equipped in a neutral country, the prize courts of such neutral country have power, and it is their duty, to restore the captured property, if brought within their jurisdiction, to its owner. *The Brig Alerta and Cargo v. Blas Moran*, 9 C. 359 . . . .iii. 379.

LAW OF NATIONS, B. 18-30.

### F. WHAT ARE LAWFUL CAPTURES, AND GOOD PRIZE, AND HEREIN OF PROBABLE CAUSE.

ADMIRALTY, C. b. 4.

1. In 1799, there was a limited state of hostilities between this country and France, and the capture of a private armed vessel, officered and manned by Frenchmen, and sailing under the French flag, was lawful, though the vessel was the property of a neutral, from whom the French possessors had captured her. *Talbot v. Seeman*, 1 C. 1 . . . .i. 331.

2. The fact, that the commander of a private armed vessel was an alien enemy at the time of the capture made by him, does not invalidate such capture. *The Mary and Susan*, 1 W. 46 . . . .iii. 461.

3. Though a vessel armed and equipped for war, and sent to a belligerent port for sale, is liable to capture by the other belligerent party, it is a commercial adventure not prohibited by our laws, or the laws of nations. *The Santissima Trinidad and The St. Ander*, 7 W. 283 . . . .v. 268.

4. Domicile of a neutral, or citizen, in an enemy's country, subjects his property embarked in trade, to capture on the high seas. *The Venus*, 8 C. 253 . . . .iii. 116. *The Frances*, 8 C. 363 . . . .iii. 178. *The Mary and Susan*, 1 W. 46 . . . .iii. 461.

5. If he cause property to be shipped before war be declared, or before its declaration be known, it is, like other enemies' property, liable to capture. *The Venus*, 8 C. 253 . . . .iii. 116.

6. But these effects of domicile cease from the moment he puts himself in motion, *bonâ fide*, to quit the country, intending not to return. *Ib.*

7. The property of a house of trade, established in the enemy's country, is condemnable, as prize. *The Friendship*, 4 W. 105 . . . .iv. 359.

8. Whatever may be the personal domicile of the partners. *Ib.*

9. British property found in the United States, on land, at the commencement of hostilities with Great Britain, cannot be condemned as enemy's property, without a legislative act, authorizing its confiscation. *Brown v. United States*, 8 C. 110 . . . .iii. 46.

10. The act of the legislature, declaring war, (2 Stats. at Large, 755,) is not such an act. *Ib.*

11. Timber discharged from the vessel in which it was imported, and floated into a salt-water creek, where the tide ebbs and flows, leaving the ends of the timber resting on the mud at low water, and prevented from floating away at high water by booms, is to be considered as landed. *Ib.*

12. Question of fact as to property. *The Frances*, 8 C. 358 . . . .iii. 174.

13. Goods purchased by British merchants, before the war between the United States and Great Britain, in pursuance of orders from American citizens, shipped to the agent of the British merchants in the United States, also an American citizen, "on account and risk of an American citizen," and no circumstances of fraud or unfairness appearing in the transaction, were vested in the American citizens at the time of the shipment, and are not liable to condemnation, although the vessel sailed from England after the declaration of war was known there. *The Merrimac*, 8 C. 317 . . . .iii. 153.

14. But if goods be purchased as above, though the accompanying invoices, bills of lading, and letters be addressed by the British consignors to the American citizens for whom the purchase was made, and all concur to show the property to be in them, yet if these documents are inclosed in a letter from the consignors to their agent in the United States, though an American citizen, directing him not to deliver the goods in case of the existence of certain circumstances, nor until he should have received payment from the consignees, in cash, the property in the said goods continued in the British consignors at the time of capture. *Ib.*

15. Goods by the same ship, purchased as above, and consigned to the agent of the consignors, being an American citizen, in whose name also the bill of lading is made out, but the bill of parcels and invoice in the name of the American merchants for whom the purchase was made; the shipment also being expressed to be on their account, though the goods are spoken of in the letter of the consignors as British property; vested in the American merchants at the time of shipment. *Ib.*

16. The circumstance that the goods continue, during the whole voyage, at

the risk of the shippers, is not of itself decisive to show that the property had not vested in the consignee. *Ib.*

17. Neutral cover of British property. *Cargo of The Ship Hazard v. Campbell*, 9 C. 205 . . . iii. 334.

18. An intention of the consignors of goods to vest the right of property in the consignee, is not sufficient to effect such a change of property, until the goods are received by the consignee, or some evidence is given of his agreement to take them on his own account; until that time, the goods are at the risk of the shippers; and if they are enemies, the goods, if captured, are good prize; and this, though the consignee were the agent of a third person who had directed him to order the goods, unless it appears that he actually did order them. *The Frances*, 8 C. 359 . . . iii. 175.

19. If a British merchant purchase, with his own funds, two cargoes of goods in consequence of, but not in exact conformity with the orders of an American house, and ship them to America, giving the American house an option within 24 hours after receipt of his letter to take or reject both cargoes, and if they give notice within the time that they will take one cargo, but will consider as to the other; this puts it in the power of the British merchant either to cast the whole upon the American house, or to resume the property, and make them accountable for that which came to their hands, and therefore the right of property in the cargo not accepted does not, *in transitu*, vest in the American house, but remains in the British subject, and is liable to condemnation, he being an enemy. *The Frances*, 9 C. 183 . . . iii. 324.

20. The commission of a privateer must be considered as qualified and limited by the laws under which it issues, and as subordinate to the instructions of the President, issued under the eighth section of the Prize Act of 1812, (2 Stats. at Large, 761.) *The Thomas Gibbons*, 8 C. 421 . . . iii. 202; *The Mary*, 9 C. 126 . . . iii. 292.

21. Under those instructions both British and American property, shipped in Great Britain, on board a vessel of the United States, after a knowledge of the war, but in consequence of the repeal of the British orders in council, are protected from capture. *Ib. Ib.*

22. A detention by perils of the sea, or an act of the enemy, does not render unlawful a voyage lawful in its inception. *The Mary*, 9 C. 126 . . . iii. 292.

23. Under the instructions of the President, a privateer may lawfully capture a vessel, liable to capture, within the territorial limits of the United States, and bound to a port of the United States. *The Joseph*, 8 C. 451 . . . iii. 217.

24. The President's instructions of the 28th August, 1812, prohibiting the interruption of vessels coming from Great Britain, in consequence of the supposed repeal of the British orders in council, must have been actually known to the commanders of vessels of war, at or before the seizure, in order to invalidate captures made contrary to the letter and spirit of the instructions. *The Mary and Susan*, 1 W. 46 . . . iii. 461.

25. A question of proprietary interest. *The St. Nicholas*, 1 W. 417 . . . iii. 614.

26. The seizure of a vessel, by the naval force of the United States, in waters, belonging to another friendly power, does not render unlawful regular judicial proceedings against the vessel, instituted after her arrival within the



jurisdiction of the United States. *Ship Richmond v. United States*, 9 C. 102....iii. 285.

27. If a vessel has a Spanish register, and sails under Spanish colors, and has on board accounts describing her as Spanish property, there is probable cause for seizing her as belonging to Spanish subjects. The right to seize, and send in for further examination, is not the right to spoliage and injure the property captured; for any damage, or spoliation, the captors are answerable to the owners, if the property be not condemned as prize. *Del Col v. Arnold*, 3 D. 333....i. 248.

28. A belligerent cruiser, who with probable cause, seizes a neutral vessel, and takes her in for adjudication, and proceeds regularly, is not a wrongdoer, and is not liable for damages. *Jennings v. Carson*, 4 C. 2....ii. 2.

#### TRADING, &c. WITH ENEMY, 5-27.

### G. RIGHTS, DUTIES, AND LIABILITIES OF NEUTRALS, IN RESPECT TO AND ARISING OUT OF CAPTURES.

1. A neutral, who has resided in an enemy's country, resumes his neutral rights, as soon as he puts himself and his family *in itinere* to return home to reside; and he has a right to take with him the means of support for himself and his family, in specie. *United States v. Guillem*, 11 H. 47....xviii. 545.

2. Such property is not forfeited by a breach of blockade by the vessel, on board of which he has taken passage, if he, personally, is in no fault. *Ib.*

3. If a neutral ship, laden in part with neutral and in part with enemy's property, be captured, the whole freight is not a charge on the property condemned; that pays only its own freight. *The Antonia Johanna*, 1 W. 159....iii. 506.

4. A neutral ship, laden with provisions, enemy's property, and the growth of the enemy's country, specially permitted to be exported for the supply of his forces, is not entitled to freight. *The Commercen*, 1 W. 382....iii. 597.

5. It makes no difference, in such a case, that the enemy is carrying on a distinct war, in conjunction with his allies, who are friends of the captor's country, and that the provisions are intended for the supply of his troops engaged in that war, and that the ship in which they are transported belongs to subjects of one of those allies, and is destined to a neutral port. *Ib.*

6. If a neutral vessel be captured on her outward voyage from England to Amelia Island, carrying a hostile cargo, which is condemned, and if, by the charter-party, the outward cargo is to be carried free of freight, but the homeward cargo is to pay at a certain rate, to be ascertained by the nature of the cargo, yet the court will decree freight to Amelia Island on the outward cargo, to be assessed upon the principles of a *quantum meruit*. *The Ship Societe*, 9 C. 209....iii. 337.

7. A neutral cargo found on board an armed enemy's vessel, is not liable to condemnation as prize of war. *The Atalanta*, 3 W. 409....iv. 241.

8. Where a neutral ship-owner lends his name to cover a fraud with regard to the cargo, this circumstance will subject the ship to condemnation. *The Fortuna*, 3 W. 236....iv. 208.



## H. RIGHTS AND DUTIES OF CLAIMANTS, AND OF THE OFFICERS AND CREWS OF CAPTURED VESSELS, AND HEREIN OF RESTITUTION.

ADMIRALTY, C. b. 3, 4.

1. If a decree of condemnation by the circuit court was rightful when pronounced, but by reason of a subsequent treaty the claimant has since become entitled to restitution, this court on appeal must order it. *United States v. Schooner Peggy*, 1 C. 103....i. 358.

2. If property has been wrongfully brought into the United States, and the duty paid by a wrongful captor, and a decree of restitution is made after a sale, the captor is liable on such a decree, only for the balance, without interest, after deducting the amount paid as duties. *The Santa Maria*, 10 W. 431....vi. 467.

3. If a party attempts to impose upon the court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he will not be entitled to restitution of that portion which he may ultimately establish as his own. *The Dos Hermanos*, 2 W. 76....iv. 31.

4. A question of proprietary interest, on further proof. Restitution decreed, with costs and expenses, to be paid by the claimant. *The London Packet*, 5 W. 132....iv. 589.

5. Concealment, or spoliation of papers, is not, *per se*, a sufficient ground for condemnation in a prize court. It is calculated to excite the vigilance and justify the suspicions of the court; but it is open to explanation. *The Pizarro*, 2 W. 227....iv. 91.

6. A question of proprietary interest and concealment of papers. *The Fortuna*, 2 W. 161....iv. 68.

7. The assertion of a false claim, in whole or in part, by an agent, or in connivance with the real owner, is a substantive cause of condemnation. *The Amiable Isabella*, 6 W. 1....v. 1.

8. Where enemy's property is fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former, and must be condemned. *The St. Nicholas*, 1 W. 417....iii. 614.

9. Captors' costs and expenses ordered to be paid by the claimant, it being his fault that defective documents were put on board. *The Venus*, 5 W. 127....iv. 588.

10. If a vessel be captured by a superior force, and a prize-master and a small force be put on board, it is not the duty of the master and crew of the captured vessel to attempt to rescue her, for they may thereby expose the vessel to condemnation, although otherwise innocent. *The Brig Short Staple and Cargo v. United States*, 9 C. 55....iii. 259.

*Supra*, D. 1-19.

## I. OF JOINT AND COLLUSIVE CAPTURES.

1. In cases of alleged joint or collusive capture, the usual simplicity of the prize proceedings is necessarily departed from; and where, in these cases, there is the least doubt, other evidence than that arising from the captured

vessel, or invoked from other prize causes, may be resorted to. *The George*  
*The Bothnea, and The Janstaff*, 1 W. 408....iii. 608.

2. The abuse of a commission by making a collusive capture does not render the commission void, but the captors acquire no title to the prize. *The Experiment*, 8 W. 261....v. 408.

3. Each case of alleged collusion is to be tried on its own circumstances; but it is one of the circumstances to be noticed by a court of admiralty, that another capture, made by the same privateer in the same cruise, has been pronounced collusive. *Ib.*

4. A question of collusive capture. Condemnation to the captors. *The Bothnea and The Janstaff*, 2 W. 169....iv. 71.

5. A question of collusive capture. The capture pronounced to be collusive, and the property condemned to the United States. *The George*, 2 W. 278....iv. 104.

## CARRIER.

BAILMENT, B.

## CASE.

The commissioner of patents, being under a legal duty to furnish copies of records of his office, upon a legal demand, an action on the case lies for a refusal. *Boyd v. Burke*, 14 H. 575....xx. 350.

ACTION, 2.

## CASHIER.

BANKS; CORPORATIONS, F. 2.

## CERTAINTY.

PLEADING, D.

## CERTIFICATE OF DIVISION OF OPINION.

JURISDICTION, A. d. 4.

## CERTIORARI

A. WHEN IT ISSUES, 82.

B. RETURNS THEREON, 82.

### A. WHEN IT ISSUES.

1. A *certiorari* will be awarded upon a suggestion that the citation has been served, but not sent up with the writ of error. *Field v. Milton*, 3 C. 514....i. 654.

2. A *certiorari* does not issue to remove a cause, on account of want of jurisdiction in the court in which it is pending. *Fowler v. Lindsey*; *Fowler v. Miller*, 3 D. 411....i. 291.

3. A *certiorari* will not be issued upon a suggestion that parts of the charge of the court below, not appearing by the bill of exceptions to have been excepted to, are not in the record. *Stimpson v. West Chester Railroad Company*, 3 H. 553....xv. 547.

### B. RETURNS THEREON.

According to the rules and practice of this court, a return made by the clerk of the circuit court for the District of Columbia, to a writ of *certiorari*, is a sufficient return. *Stewart v. Ingle*, 9 W. 526....vi. 166.

## CHALLENGE.

JURY, B.

## CHAMPERTY.

ASSIGNMENT OF CHUSES IN ACTION, A. 14.

## CHARGE OF JUDGE.

PRACTICE, II. G. 4.

## CHARGE ON LAND.

WILL, D. 2.

CHARITY.

A. GRANTS AND DEVISES TO CHARITABLE USES AND CAPACITY TO TAKE UNDER THE SAME, 83.

B. WHAT ARE VALID CHARITABLE USES, 84.

C. JURISDICTION OF CHANCERY OVER, 84.

A. GRANTS AND DEVISES TO CHARITABLE USES AND CAPACITY TO TAKE UNDER THE SAME.

1. A devise to the "Baptist Association," a voluntary association, to constitute a fund for the education of youth, &c., is void at law. *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 4 W. 1....iv. 330.

2. It was the intention of the testator that the association should take and execute the trust in its character of an association, and it is not capable in law of so doing. *Ib.*

3. The incorporation of the association, subsequent to the death of the testator, does not enable it to take a devise made to a society not capable of taking it at the death of the testator. *Ib.*

4. In a suit by the heirs of McDonogh to set aside his will, it was *held*, under the law of Louisiana : 1. That the cities of Baltimore and New Orleans were legatees with a universal title. 2. That they were corporations capable of taking this title. 3. That the legacies did not amount to substitutions, or *fidei commissa*. 4. That the testator could define the use and destination of his legacies, while he declared them to be for the poor, and for such objects as were within the range of the powers and duties of the cities. 5. That the prohibitions to alienate, and other conditions, not possible, or contrary to the laws, are as if not written, and do not affect the validity of the legacies. 6. That, as in Maryland, a Louisiana corporation would be allowed to take under a will, so under this will Baltimore may take. 7. That if any invalid charge is made on the legacies, the legacy is valid and freed from the charge. *McDonogh's Executors v. Murdough*, 15 H. 367....xx. 564.

5. Land, at common law, may be granted to pious uses before there is a grantee in existence competent to take it, and in the mean time the fee will be in abeyance. *Town of Pawlet v. Clarke*, 9 C. 292....iii. 358.

6. Such a grant cannot be resumed at the pleasure of the crown. *Ib.*

7. The corporation of the city of Philadelphia is capable of taking under a devise of real and personal estate in trust for the establishment and support of a college for poor orphan boys, and can execute the trust. *Vidal v. Girard's Executors*, 2 H. 127....xv. 61.

8. The 32 & 34 Hen. VIII. disabling corporations to take by devise, is not in force in Pennsylvania. Though the 43 Eliz. c. 4, is not in force in Pennsylvania, its conservative provisions are recognized, and charitable devises are not void in that State, on account of the inability of the trustee to take, or of the uncertainty of the beneficiaries. *Ib.*

## B. WHAT ARE VALID CHARITABLE USES.

1. A devise upon a trust to establish and maintain a college for the education of indigent orphan boys, is a charitable bequest, although the will of the testator excludes all ecclesiastics, missionaries, and ministers of all sects, from exercising any trust or duty concerning the college, and from admission for any purpose, or as visitors, within its precincts. *Vidal v. Girard's Executors*, 2 H. 127 . . . . xv. 61.

2. A testator empowered his executors, after the death of his wife, to distribute the residue of his estate among such charitable institutions of South Carolina and Pennsylvania as they might deem most beneficial to mankind; the wife survived the executors; *held*, that even if such a power, confided to these particular persons by the testator, could be executed in England by the chancellor, it could not be by any court of the United States, and that this court could not take this residue from the next of kin. *Fontain v. Ravenel*, 17 H. 369 . . . . xxi. 555.

3. A bequest "to some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria, leaving the same entirely to their disposition of it, in such manner as appears to them promises to yield the greatest good"—is too vague to be executed by a court of chancery, under its ordinary judicial equity powers; and the 43d of Elizabeth, not having been adopted as part of the law of Virginia, the bequest there is void, and the property belongs to the heir at law. *Wheeler v. Smith*, 9 H. 55 . . . . xviii. 33.

## C. JURISDICTION OF CHANCERY OVER. (EQUITY, B. b. 1.)

1. The interference of chancery in charities, where the *cestuis que trust* have not a vested interest, was founded on, and still depends on the 43d of Elizabeth; and so is not within the equity powers of the courts of the United States. *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 4 W. 1 . . . . iv. 330.

2. There being no particular persons designated, who are the individual objects of the testator's bounty, there are no *cestuis que trust* to claim its execution. *Ib.*

*Supra*, B. 2, 3.

## CHARTER PARTY.

SHIPPING, D.

## CHOSE IN ACTION.

ASSIGNMENT OF CHOSE IN ACTION.

## CHURCH.

## CHARITY.

1. The religious establishment of England was adopted by the colony of Virginia, together with the common law upon that subject, as far as it was applicable to the circumstances of the colony. *Terrett v. Taylor*, 9 C. 43.... iii. 249.

2. The act of 1798, c. 9, merely repeals the statutes passed respecting the church since the Revolution; and left in full operation all the statutes previously enacted, so far as they are not inconsistent with the present constitution. *Ib.*

3. The freehold of the church lands is in the parson. *Ib.*

4. Church-wardens are not a corporation for holding lands. *Ib.*

5. Church lands cannot be sold without the joint consent of the parson (if there be one) and the vestry. *Ib.*

6. The vestry of the Episcopal church of Alexandria, now known by the name of Christ's Church, is the regular vestry, in succession, of the parish of Fairfax, and, in connection with the minister, has the care and management of all the temporalities of the parish within the scope of their authority. A sale by them of the church lands, with the assent of the minister, under the former decree of this court, conveys a good title to the purchaser. *Mason v. Muncaster*, 9 W. 445....vi. 127.

7. The Church of England is not a body corporate, and cannot receive a donation *eo nomine*. *Town of Pawlet v. Clarke*, 9 C. 292....iii. 358.

8. A grant to the church of such a place is good at common law, and vests the fee in the parson and his successors. *Ib.*

9. If such a grant be made by the crown, it cannot be resumed by the crown at its pleasure. *Ib.*

10. The common law, so far as it related to the erection of Episcopal churches, the right to present or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, was recognized and adopted in New Hampshire. *Ib.*

11. It belonged exclusively to the crown to erect the church, in each town, that should be entitled to take the glebe, and upon such erection to collate, through the governor, a parson to the benefice. *Ib.*

12. A voluntary society of Episcopalians within a town, unauthorized by the crown, could not entitle themselves to the glebe. *Ib.*

13. Where no such church was duly erected by the crown, the glebe remained as an *hæreditas jacens*, and the State, which succeeded to the rights of the crown, might, with the assent of the town, alien or encumber it; or might erect an Episcopalian church therein, and collate, either directly, or through the vote of the town, indirectly, its parson, who would thereby become seised of the glebe *jure ecclesiæ*, and be a corporation capable of transmitting the inheritance. *Ib.*

14. No Episcopal church in Vermont can be entitled to the glebe, unless it

was duly erected by the crown before the Revolution, or by the State since. *Ib.*

15. Upon a bill in equity by several travelling preachers of the Methodist Episcopal Church South, in behalf of themselves and the other travelling preachers of that organization, *held*, 1. That as numerous parties had a common interest in the fund in controversy, a few might sue, representing the others. *Smith v. Swormstedt*, 16 H. 288 . . . . xxi. 137.

16. 2. That the General Conference, in 1844, had power to consent to the division of the Methodist Episcopal Church into two bodies, and that the separation was not a secession of a part of the travelling preachers from that church, but a division, in pursuance of proper authority. *Ib.*

17. 3. That this division carried with it, as matter of law, a division of the common property, which belonged to the travelling preachers, as such. *Ib.*

18. 4. That the removal of the sixth restrictive article, was not a condition to the enjoyment by the Church South of its share of the common fund, but to enable the General Conference to make the division. *Ib.*

19. 5. That as the complainants not only represent the other travelling preachers South, but the "Book Concern" there, the share of the fund they thus represent may properly be paid over to them. *Ib.*

CONSTITUTIONAL LAW, P. 2, 3; DEED, E. 5.

## CIRCUIT COURT.

COURTS OF THE UNITED STATES; JURISDICTION; PRACTICE.

## CITATION.

APPEAL, B; ERROR, A; PRACTICE, I. A. 1.

1. Though no citation appears in the record, it may be proved, *aliunde*, that one was issued. *Innerarity v. Byrne*, 5 H. 295 . . . . xvi. 404.

2. In a case from Louisiana, errors in a citation by calling the wrong defendant, the wife of C. B., and omitting to state that the plaintiff was a trustee, are not material. *Peale v. Phipps*, 8 H. 256 . . . . xvii. 578.

## CITIZEN.

ALIEN, A.; ALLEGIANCE; TREATIES, A. 3.

1. Persons born in the colonies, before the declaration of independence, had a right to elect whether they would retain their native allegiance to the British crown, or would become citizens of the several States. *Inglis v. Trustees of the Sailors' Snug Harbor*, 3 P. 99 . . . . viii. 305.



2. This right of election has reference to the date of the declaration of independence ; but it is not necessary that the election made should have been manifested by any act, prior to, or at the very time of the declaration of independence. *Ib.*

3. *Primâ facie*, if born here before July 4, 1776, and remaining here after that day, the person is to be deemed an American citizen ; but this presumption may be rebutted, by acts showing an adhesion to the British crown during the struggle. *Ib.*

4. But, though the election may be manifested by acts subsequent to July 4, 1776, yet it was competent for each State, at any time after that day, to claim the allegiance of all persons born and residing within its limits, and no acts done after such claim, would affect the question of citizenship, as was held in *McIlvaine v. Coxe's Lessee*, 4 C. 211. *Ib.*

5. Where a man and his wife, they having no children, became residents on a plantation which he owned and cultivated, for the space of two years, and nothing to the contrary appeared, it was held, that his citizenship of the State where he thus resided was fairly inferable. *Shelton v. Tiffin*, 6 H. 163.... xvi. 643.

6. Whether a right of expatriation exists under our constitution and laws, *quære*. But if it does, not only a renunciation of citizenship of the United States, but actual removal, for some lawful purpose, and the acquisition of a domicile elsewhere, are necessary to effect it. *Talbot v. Janson*, 3 D. 133.... i. 128.

7. The District of Columbia is not "a State," within the meaning of that term as used in the constitution, and its citizens cannot sue in the courts of the United States as citizens of any State. *Hepburn v. Ellzey*, 2 C. 445.... i. 520.

8. By the separation of the District of Columbia from Maryland, the inhabitants of the district ceased to be citizens of that State, and a discharge of one of them under the insolvent laws of Maryland was not valid. *Reily v. Lamar*, 2 C. 344.... i. 495.

CAPTURE, E. 5 ; CONSTITUTIONAL LAW, P. 1 ; EMBARGO, &c. A. 5, 6.

## CLAIM.

ADMIRALTY, C. a. 4, b. 3.

## CLERKS OF COURTS.

PRACTICE, I. B. 3.

1. The acts of congress, organizing the courts in Louisiana, confer on the district judge power to appoint the clerk of the district court, and they make him clerk of the circuit court. *Ex parte Hennen*, 13 P. 230.... xiii. 135.

2. No tenure of this office being prescribed, by the constitution or laws of

the United States, it is held at the will of the appointing power, and of the incumbent, and the former may remove the latter at pleasure. *Ib.*

3. No particular form of appointment or removal is prescribed by law; if the clerk has notice that he has been removed and another appointed, and the judge in fact made such appointment, and recognized the appointee as clerk, it is sufficient. *Ib.*

4. In Mississippi, the authority of the judge of the probate court to appoint a clerk *pro tempore*, is not limited to an appointment during the term of the court. If the disability of the clerk is temporary, though in fact continuing into the vacation, the clerk *pro tempore* may continue to act. *Cocks v. Halsey*, 16 P. 71 . . . .xiv. 189.

5. The judge had power to decide finally upon the exigency. *Ib.*

6. If the appointment of clerk should regularly have been limited to the duration of the term, still, he was clerk, *de facto*, and his acts, as clerk, valid, so far as respects third persons. *Ib.*

7. Each party is liable to the clerk of this court for the fees due to him from such party. *Caldwell v. Jackson*, 7 C. 276 . . . .ii. 527.

## COLLATERAL SECURITY.

### DEBTOR AND CREDITOR.

## COLLISION.

### A. RULES OF NAVIGATION AND MANAGEMENT, AND WHEN IN FAULT, 88.

### B. WHAT DAMAGES MAY BE RECOVERED, 89.

### C. HOW LOSS BORNE, 90.

### D. OTHER MATTERS, 90.

### A. RULES OF NAVIGATION AND MANAGEMENT, AND WHEN IN FAULT.

1. Collision between a steamer and a sailing vessel on Long Island Sound. *St. John v. Paine*, 10 H. 557 . . . .xviii. 503.

2. Certain rules of navigation laid down. *Ib.*

3. A steamer, meeting a sailing vessel, closehailed, or having the wind free, must take measures to avoid the latter, which should keep its course. *Ib.*

4. The steamer pronounced in fault: 1. For want of a proper look-out; 2. For attempting, under the circumstances, to go to windward, and pass on the starboard hand of the sailing vessel; 3. Because those in charge of the movements of the steamer exhibited, in their answers, ignorance of their duties, which might fairly be considered as having contributed to produce the collision. *Ib.*

5. Collision between a steamer and a sailing vessel on the North River. *Newton v. Stebbins*, 10 H. 586....xviii. 510.

6. A steamer meeting a sailing vessel coming down a river with the tide and very little wind, is bound to take the necessary precautions to avoid the latter, which should keep her course. *Ib.*

7. The rule which requires a sailing vessel to keep her course, and allows a steamer to elect what manœuvre to make to go clear, applies only when there is some immediate danger of collision, if both vessels keep their course; and where a schooner and steamer on a lake, with plenty of sea room, were six miles apart, and the schooner changed her course, she was not in fault thereby. *Propeller Monticello v. Mollison*, 17 H. 152....xxi. 423.

8. Though it is a rule that a sailing vessel should keep her course when approaching a steamer, and it is the duty of the latter to keep out of her way, yet this does not apply to a case where the steamer was not in fault for not seeing the sailing vessel till they were too near to allow the steamer to change her course; in such a case, the steamer having stopped, as soon as the sailing vessel was discovered, and being in the act of backing when the collision occurred, was held to be in no fault. *Peck v. Sanderson*, 17 H. 178....xxi. 439.

9. If a steamer is wrongfully in dangerous proximity to a flatboat, and the proximate cause of a collision is an unexpected sheer given to the flatboat by an eddy, the steamer is in fault, and must bear the whole loss. *Fretz v. Bull*, 12 H. 466....xix. 249.

10. If a steamer be wrongfully in a dangerous proximity to a sailing vessel, and there is immediate and pressing danger of a collision, and the master of the sailing vessel, previously in no fault, in the alarm of the moment, fails to give the most proper order, this does not exempt the steamer from damages for the collision which ensues. *Propeller Genesee Chief v. Fitzhugh*, 12 H. 443... xix. 233.

11. If a collision occurs in the night between a steamer and a sailing vessel, and the steamer had not a proper look-out kept, this is *prima facie* evidence that the fault of the steamer occasioned the collision. *Ib.*

12. What is a proper look-out, explained. *Ib.*

13. If a steamboat, injured by a collision on the Ohio, observed the customary rule, which requires a descending boat to keep the middle of the stream and stop her engines when meeting an ascending boat, she is not in fault for not backing, when it was uncertain whether the ascending boat would pass ahead or astern. *Williamson v. Barrett*, 13 H. 101....xix. 411.

14. A vessel closehauled, meeting one having the wind free, luffed; held to be in fault for not keeping her course. *Schooner Catharine v. Dickinson*, 17 H. 170....xxi. 434.

15. It is not an excuse for want of a proper look-out in the night, in a place much frequented by vessels, that all hands were employed in reefing, there being no unusual emergency. *Ib.*

16. A case of collision on the Mississippi River, turning wholly on a question of fact. *Walsh v. Rogers*, 13 H. 283....xix. 498.

## B. WHAT DAMAGES MAY BE RECOVERED.

1. When a vessel, injured by collision, is run on to a beach, bilged, and after-

wards raised and repaired, the measure of damage is the cost of raising and restoring her to as good a condition as she was in at the time of the injury; in such a case, the owner cannot sell her, as she lies, deduct the price from the value before the collision, and recover the difference. *Schooner Catharine v. Dickinson*, 17 H. 170....xxi. 434.

2. In an action to recover damages suffered by a collision, the plaintiff cannot show as a claim for damages, that the injury delayed the arrival of his vessel and cargo at their port of destination, until the fit season for the sale of the cargo was passed, and its price was thereby lessened. *Smith v. Condry*, 1 H. 28....xiv. 487.

3. Damages for demurrage may be given in a collision case, and the rate of freight which a vessel would have earned, deducting expenses, is a proper measure. *Williamson v. Barrett*, 13 H. 101....xix. 411.

### C. HOW LOSS BORNE.

1. Each vessel must bear its own loss arising out of a collision from inevitable accident. *Stainback v. Rae*, 14 H. 532....xx. 321.

2. If both vessels are in fault, the loss by collision is to be divided. *Schooner Catharine v. Dickinson*, 17 H. 170....xxi. 434.

### D. OTHER MATTERS.

1. The question whether there is a legal liability for the consequences of a collision in an English port, must be determined by the law of England. *Smith v. Condry*, 1 H. 28....xiv. 487.

2. For damages done by a collision in the port of Liverpool, occasioned by the default, negligence, or unskilfulness of a licensed pilot, the owner is not responsible. *Ib.*

3. It is not a defence to a cause of collision that the libellants have been paid a total loss by underwriters. *Propeller Monticello v. Mollison*, 17 H. 152....xxi. 423.

## COMMISSION OF FOREIGN VESSEL OR OFFICER.

CONFLICT OF LAWS, H.; EVIDENCE, F.

## COMMISSIONS AS COMPENSATION OF GUARDIANS, &c.

JURISDICTION A. f.

## COMMITMENT.

WARRANT.

## COMMON LAW.

SUITS AT COMMON LAW; JURISDICTION, B. b. 3; JURY, C.

## COMPACTS OF STATES.

1. Under the compact between Pennsylvania and Virginia of 1780, which declares that, in disputes concerning titles to land, preference shall be given to the elder or prior right, it was held that a settlement right under Virginia should take date from the time of the settlement, and not from the date of the certificate, of which the expense and danger of making the settlement formed the consideration. *Marlatt v. Silk*, 11 P. 1....xii. 319.

2. The compact between Virginia and Kentucky was a contract, within the 18th section of the 1st article of the constitution of the United States. *Green v. Biddle*, 8 W. 1....v. 346.

3. It is not necessary that the consent of congress to a compact between two States should be expressed in any particular form; and when congress consented to the separation of Kentucky and its erection into a State, it must be taken to have consented to the compact by which the separation was agreed to be made. *Ib.*

4. It is not a valid objection to the compact that it restricts the exercise of the legislative power of Kentucky in certain particulars. *Ib.*

5. The provision in the compact for the appointment of commissioners has reference to disputes between the States, and not between individuals, and does not divest the ordinary tribunals of their jurisdiction over suits between individuals, in which a dispute concerning the effect of the compact arises. *Ib.*

6. The act of the legislature of Kentucky, of the 31st of January, 1812, relieving the occupant of land from paying damages for its wrongful detention before action brought, and requiring the lawful owner of the land to pay the occupant for his improvements, did impair the obligation of that part of the compact which declares, "that all private rights and interests in lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State." *Ib.*

7. The compact between Virginia and Kentucky provided for the preservation of titles, not of the tribunals by which they were to be tried. *Wilson v. Mason*, 1 C. 45....i. 346.

8. The 7th article of the compact between Virginia and Kentucky, did not preclude the latter State from passing a reasonable statute of limitations. *Hawkins v. Barney's Lessee*, 5 P. 457....ix. 423.

9. *Quære.* Whether the compact of 1789, between Virginia and Kentucky, restrained the legislature of Kentucky from prolonging the time for surveying one entry to the prejudice of another? *Miller's Heirs v. M'Intire*, 11 W. 441....vi. 657.

10. The compact between Virginia, North Carolina, and Tennessee, operated on titles, not remedies. *Robinson v. Campbell*, 3 W. 212....iv. 200.

11. The State of North Carolina, by her act of cession of the western lands of 1789, c. 3, recited in the act of congress of April 2, 1790, (1 Stats. at Large, 106,) accepting that cession, and by her act of 1803, c. 3, ceding to Tennessee the right to issue grants, has parted with her right to issue grants for lands within the State of Tennessee, upon entries made before the cession. *Burton's Lessee v. Williams*, 3 W. 529....iv. 280.

12. The compact of 1820, between Kentucky and Tennessee, admitted that the true boundary between those States was the parallel of latitude of 36 degrees and 30 minutes, and that Walker's line was to be deemed the true line only for the purpose of future jurisdiction. *Poole v. Fleeger's Lessee*, 11 P. 185....xii. 395.

13. It belongs to sovereignty to fix boundaries between their respective jurisdictions; and when fixed by compact, they become conclusive upon their citizens and bind their rights. This power, though it can only be exercised with the consent of congress, still resides with the several States. But, whether the prohibition to pass any law impairing the obligation of a contract is to be considered as subject to the exception of the rights of the States to make compacts with each other, is not decided. *Ib.*

14. The act of the legislature of Pennsylvania, passed in 1836, imposing a toll upon carriages carrying the mail of the United States over that part of the Cumberland road within that State, is in conflict with the compact between that State and the United States, arising from the act of congress of March 3, 1835, (4 Stats. at Large, 772,) under which the State took possession of the road. *Searight v. Stokes*, 3 H. 151....xv. 346.

15. The act of the legislature of Ohio, imposing a toll upon passengers in mail stage-coaches, over the Cumberland road, to the exclusion of all other passengers, does, in effect, exact a toll of mail coaches, and thus imposes upon the United States a part of the burden of supporting the Cumberland road, contrary to the compact between the State and the United States, under which the State took the road. *Neil v. Ohio*, 3 H. 720....xv. 616.

16. Under the compact between the United States and the State of Maryland, respecting the Cumberland road, the imposition of a toll of four cents for every passenger carried in a mail-coach is, in effect, the imposition of a tax upon the United States, through the contractors for carrying the mail; and the other requirement, to pay the sum of one dollar for every mail-coach passing a gate, whereof the proprietor does not report the number of passengers, is but a commutation for such tolls; and the law is a violation of that compact, and void. *Achison v. Huddleson*, 12 H. 293....xix. 140.

#### CONSTITUTIONAL LAW, A. 4

### COMPOSITION.

#### ACCORD AND SATISFACTION.

The rule which cuts off secret agreements to give advantages to particular

creditors for coming into compositions, has no application to cases where each creditor made his own bargain and got the best terms he could. *Clarke v. White*, 12 P. 178....xii. 680.

## COMPROMISE.

A family compromise of litigated rights upheld by the court, though wanting in some formalities, and subject to some doubts as to its fairness. *Gratz's Executors v. Cohen*, 11 H. 1....xviii. 529.

## CONDEMNATION.

JUDGMENTS AND DECREES, B. 2.

## CONDITION.

CONTRACT, D.; LEASES AND TERMS FOR YEARS, 4.; PUBLIC LANDS OF THE UNITED STATES, III. D. c. and d. 6.

If a condition subsequent be broken, a stranger cannot take advantage of it. *Webster v. Cooper*, 14 H. 488.....xx. 296.

## CONFEDERATION.

1. During the war of the Revolution, congress had power to appoint commissioners of appeal, and to constitute an appellate court for the final decision of prize causes. *Penhallow v. Doane's Administrators*, 3 D. 54....i. 84.

2. In a prize cause, an appeal having been taken from the decision of the highest court of the State of New Hampshire, to congress, and having been referred to the commissioners of appeal, and subsequently heard and adjudicated by the court of appeals, it was held that its decree was *coram judice*, and binding. *Ib.*

3. This decree not having been executed, the district court of the United States for New Hampshire had jurisdiction of a libel to enforce it. *Ib.*

4. The death of one of the parties to the decree did not affect the right to have the decree executed. *Ib.*

5. A prayer for general relief, allowed a recovery of damages for not executing the original decree. *Ib.*

6. The court of appeals established by the continental congress, had power to reverse the sentence of a state court of admiralty. *United States v. Peters*, 5 C. 115....ii. 206.



## CONFIRMATION.

CONSTITUTIONAL LAW, K. 4, 5; PUBLIC LANDS OF THE UNITED STATES, III C.

## CONFISCATION.

1. The act of Pennsylvania, of 1779, "for vesting the estates of the late proprietaries of Pennsylvania, in this commonwealth," did not confiscate lands of the proprietaries which were within the lines of manors; nor were the same confiscated by the act of 1781, for establishing a land-office; nor was the right of entry, to enforce the payment of unpaid purchase-money, taken away by either of those acts. *Kirk v. Smith*, 9 W. 241 . . . .vi. 34.

2. The act of the State of Georgia did not confiscate, but only sequestered British debts, and the right to recover them revived at the peace. *Georgia v. Brailsford*, 3 D. 1 . . . .i. 71.

3. The act of the State of Georgia confiscating the land of a mortgagor, did not destroy the estate of a mortgagee in the land. *Higginson v. Mein*, 4 C. 415 . . . .ii. 155.

4. By the confiscation acts of Maryland, equitable interests were completely divested, by operation of law, without office found. *Smith v. Maryland*, 6 C. 286 . . . .ii. 409.

CONSTITUTIONAL LAW, O. 6.

## CONFLICT OF LAWS.

DOMICILE; LAWS OF THE SEVERAL STATES.

A. ADMINISTRATORS AND EXECUTORS, AND RIGHTS OF CREDITORS OF DECEASED PERSONS, 95.

B. ASSIGNMENTS, AND HEREIN OF FOREIGN BANKRUPT AND INSOLVENT LAWS, 95.

C. BILLS AND NOTES, 96.

D. CAPACITY AND STATUS OF PERSONS, 96.

E. CONTRACTS AND CONVEYANCES AND HEREIN OF RIGHTS TO LAND, 96.

F. FOREIGN CORPORATIONS, 97.

G. DISTRIBUTION AND SUCCESSION, 97.

H. EVIDENCE, AND HEREIN OF REGISTRATION AND OF THE EVIDENCE OF FOREIGN LAWS, 98.

I. EXTRA TERRITORIAL FORCE OF LAWS, 98.

J. INTEREST, 98.

**K. JUDGMENTS AND DECREES, 98.**

**L. LIMITATIONS, 99.**

**M. MARRIAGE, 99.**

**N. REMEDIES, 99.**

**O. WILLS, 99.**

**A. ADMINISTRATORS AND EXECUTORS, AND RIGHTS OF CREDITORS OF DECEASED PERSONS.**

1. An executor derives his power to sue, not from the will, but from the letters testamentary, and consequently can sue only in courts to which the power of those letters extends. *Dixon's Executors v. Ramsay's Executors*, 3 C. 319....i. 594.

2. Though the plaintiff took administration in Maryland, before the separation of the District of Columbia, he cannot sue as administrator in the circuit court for that District. *Fenwick v. Sears's Administrators*, 1 C. 259....i. 411.

3. Though a judgment obtained against one executor in a State where he has qualified, is not conclusive against another executor in another State where he has qualified, it is *prima facie* valid; and a bar by the statute of limitations, of the original cause of action, is not a bar to a suit on such a judgment. *Hill v. Tucker*, 13 H. 458....xix. 587.

4. If an executor in one State assign a debt due from a person residing in another State, by whose laws an assignee may sue in his own name, such assignment makes a complete title, and it is not necessary to take letters of administration in the latter State, to enable the assignee to sue in his own name. *Harper v. Butler*, 2 P. 239....viii. 103.

5. The right of priority of payment among creditors of an intestate depends on the law of the place where the assets are administered, and not on the law of the place of the contract, or of the domicile of the deceased; and therefore, where administration was taken under the laws of Maryland, of assets there, where all debts are of equal dignity, and the intestate was domiciled, and owed a bond debt in Virginia, where bond debts have a preference, *held*, that the bond debt had no prior right of payment out of the assets in Maryland. *Smith v. Union Bank of Georgetown*, 5 P. 518....ix. 452.

EXECUTORS, &c. A. 19.

**B. ASSIGNMENTS, AND HEREIN OF FOREIGN BANKRUPT AND INSOLVENT LAWS.**

1. The appointment of a receiver, under a creditor's bill, filed in a court of chancery of the State of New York, against one who was a resident of that State, did not vest in the receiver the debtor's claim against a foreign government. *Booth v. Clark*, 17 H. 322....xxi. 524.

2. The bankrupt law of a foreign country cannot operate a legal transfer of property in this country. *Harrison v. Sterry*, 5 C. 289....ii. 267.

3. A decree in bankruptcy in the district court of the United States for Louisiana, did not affect the title of the debtor to land in Texas, which had not then been admitted into the Union. *Oakey v. Bennett*, 11 H. 33....xviii. 540.

4. A discharge under a foreign bankrupt law is no bar to an action, in the courts of this country, on a contract made here. *M'Millan v. M'Neill*, 4 W. 209....iv. 374.

5. This case not distinguished from *Sturges v. Crowninshield*, p. 362, by the circumstance that the state law was passed before the debt was contracted. *Ib.*

#### C. BILLS AND NOTES. (BILLS, &c. G. 2, 5.)

1. The acceptor residing in Louisiana, and the indorser in Mississippi, the contract of the latter is to be governed by the law of Mississippi; and as that requires presentment of the bill to charge an indorser, the indorser in this case is not liable without presentment, even if the law of Louisiana dispensed with it. *Musson v. Lake*, 4 H. 262....xvi. 103.

2. Notes drawn and dated at Baltimore, but delivered in New York, in payment for goods purchased there, are payable in, and to be governed by the laws of New York. *Cook v. Moffat*, 5 H. 295....xvi. 405.

#### D. CAPACITY AND STATUS OF PERSONS.

1. A Spanish subject, who came here in time of peace to carry on trade, and remains here, engaged in trade, after a war began between Spain and Great Britain, is to be deemed an American merchant, although the trade in which he was engaged could be carried on only by a Spanish subject, by the law of Spain. *Livingston v. Maryland Ins. Co.* 7 C. 506....ii. 648.

2. British subjects, resident in Portugal, (though entitled to great privileges,) do not retain their native character, but acquire that of the country where they reside and carry on their trade. *The Friendship*, 3 W. 14....iv. 154.

#### E. CONTRACTS AND CONVEYANCES, AND HEREIN OF RIGHTS TO LAND.

1. If a contract is not made with reference either to the law of the place where it is made, or where it is to be performed, being forbidden by both, the law of the place where it is made governs, as to its invalidity. *Andrews v. Pond*, 13 P. 65....xiii. 42.

2. A contract of guarantee signed in New York, and to be executed in England, is governed by the laws of the latter country, in respect to its construction and effect. *Bell v. Bruen*, 1 H. 169....xiv. 552.

3. Though an official bond of a navy agent, was, in fact, executed at New Orleans, it was a contract to be executed at Washington, and the liability of its parties must be governed by the rules of the common law. *Cox v. United States*, 6 P. 172....x. 83.

4. A contract of suretyship, entered into by consignees at New Orleans, to procure the release of a vessel consigned to them and attached for a debt of the consignor, who resided at Baltimore, and the implied obligation of the consignor to indemnify them, are Louisiana contracts, and are not governed by the law of Maryland. *Boyle v. Zacharie*, 6 P. 635....x. 291.

5. A deed of personal property, in Virginia, where both the parties resided,

duly recorded in that State, and valid there, protects their title when the parties afterwards remove into another State to reside. *Bank of the United States v. Lee*, 13 P. 107 . . . . xiii. 68.

6. The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate. *United States v. Crosby*, 7 C. 115 . . . . ii. 477. *Clark v. Graham*, 6 W. 577 . . . . v. 172.

7. So title by devise can be acquired only under a will duly proved and recorded, according to the law of the State in which the lands lie. *M' Cormick v. Sullivan*, 10 W. 192 . . . . vi. 377.

8. And an inchoate title to lands in Ohio, under Virginia military reservations, is, in its nature, real property, and cannot be devised by a will, except under and in accordance with the laws of Ohio. Even if considered to be personalty, being in Ohio, the same law would be applicable. *Kerr v. Moon's Devises*, 9 W. 565 . . . . vi. 187.

#### BOND, B. 2.

### F. FOREIGN CORPORATIONS.

1. A corporation can do no acts and make no contracts, either within or without the State which created it, except such as are authorized by its charter. *Bank of Augusta v. Earle*, 13 P. 519 . . . . xiii. 277.

2. A corporation, created by the legislature of New York, having power by its charter to hold lands in Pennsylvania, purchased lands there, and the title was conveyed to trustees to hold for the purposes of the corporation, provided for in its charter; *Held*, 1. That the right thus to hold the lands must depend upon the permission, expressed or implied, of the State of Pennsylvania. *Runyan v. Coster's Lessee*, 14 P. 122 . . . . xiii. 381.

3. That a foreign corporation is permitted to take and hold lands in that State, though liable to have its title divested by proceedings in behalf of the State. *Ib.*

4. Though the positive or customary law of the place where the corporation is created governs the transfer of its shares, yet if there be no positive or customary law to the contrary, a transfer good by the law of the place of the owner's domicile is valid everywhere. *Black v. Zacharie*, 3 H. 483 . . . . xv. 527.

#### BANKS, 7, 8.

### G. DISTRIBUTION AND SUCCESSION.

1. In cases of intestacy, personal property is distributable according to the law of the testator's domicile. *Ennis v. Smith*, 14 H. 400 . . . . xx. 251.

2. Rights to personal property are regulated by the law of domicile of the testator, but remedies by the law of the forum. *Dixon's Executors v. Ramsay's Executors*, 3 C. 319 . . . . i. 594.

## H. EVIDENCE, AND HEREIN OF REGISTRATION AND OF THE EVIDENCE OF FOREIGN LAWS.

### EVIDENCE, G. 1.

1. The seal to the commission of a new government, not acknowledged by the government of the United States, cannot be permitted to prove itself; but the fact, that the vessel cruising under such commission is employed by such government, may be established by other evidence, without proving the seal. *The Estrella*, 4 W. 298....iv. 406.

2. An antenuptial contract, duly made and recorded in the State where the parties reside, and where the property is, continues to bind that property as against creditors and purchasers on its subsequent removal to another State. *De Lane v. Moore*, 14 H. 253....xx. 168.

3. A copy of the civil code of France, presented to the supreme court of the United States, by "*Le Garde des Sceaux de France*," was held to be admissible evidence of the written laws of France. *Ennis v. Smith*, 14 H. 400....xx. 251.

4. Foreign laws, on a subject of common concern, which have been promulgated by the government of the United States, may be read in a court of admiralty, without further proof. *Talbot v. Seeman*, 1 C. 1....i. 331.

5. It is not a consular function to authenticate the laws of a foreign state, and the certificate of a consul to that effect is not evidence. *Church v. Hubbard*, 2 C. 187....i. 470.

*Supra*, E. 5. EVIDENCE, F. 9, M. 2.

## I. EXTRA TERRITORIAL FORCE OF LAWS.

JURISDICTION, F; LAW OF NATIONS, B.

### J. INTEREST.

1. An agent who advances his money at New Orleans, upon an undertaking of his principal to replace it there by accepting and paying bills drawn there by the agent, is liable to pay the New Orleans rate of interest, if he dishonors the bills. *Lanusse v. Barker*, 3 W. 101....iv. 180.

2. A contract for the loan of money entered into in Rhode Island, is to be governed by the usury laws of that State, though security was agreed to be taken upon lands in Kentucky. *De Wolf v. Johnson*, 10 W. 367....vi. 438.

3. A contract tainted by usury according to the laws of one State, may be a valid basis for a new contract in another State. *Ib.*

## K. JUDGMENTS AND DECREES.

EVIDENCE, G. 1; JUDGMENTS, &c. B. 2, 3; LAW OF NATIONS, B.; MARSHALLING OF ASSETS.

1. In every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court is examinable. *Ross v. Himely*, 4 C. 241....ii. 87.

2. So is the question, whether the *res* was so situated as to be subject to the jurisdiction. *Ib.*

3. In order to prove the condemnation of a vessel, it is only necessary to produce the libel and sentence. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 C. 206....ii. 373.

4. It is a useless practice to read the proceedings at length. *Ib.*

5. The depositions stated in such proceedings are not evidence in an action upon the policy of insurance. *Ib.*

6. A decree of the court of nobility of the government of Grodno, and another of the court of Kobryn, in Russian Lithuania, those tribunals being proved to have jurisdiction, are evidence of a pedigree—they are judgments *in rem*. *Ennis v. Smith*, 14 H. 400....xx. 251.

7. A copy of a foreign decree, purporting to be certified as correct by a person signing his name and adding to it, "secretary of state for foreign affairs," and affixing his own seal, is not duly authenticated. *Church v. Hubbard*, 2 C. 187....i. 470.

8. Copies of the proceedings of a foreign court of admiralty, may be authenticated by the seal of the court and the attestation of the deputy registrar, and the certificate of the judge under his hand and the seal of the court, attesting the seal, and the fact that the person signing is registrar; and the certificate and seal of the secretary and notary of the island, proving that the person signing as judge, holds that office. *Yeaton v. Fry*, 5 C. 335....ii. 285.

9. Such proof is in conformity with the law, and also with the 19th article of the treaty of 1794, with Great Britain. *Ib.*

CONSTITUTIONAL LAW, E. 2; INSURANCE, I. C. 6, 7.

## L. LIMITATIONS.

Statutes of limitation, which only bar the remedy, are laws of the forum only; consequently, a statute of limitations of a foreign country, or another State, where the contract was made, cannot be pleaded in bar. *Townsend v. Jemison*, 9 H. 407....xviii. 200.

## M. MARRIAGE. (See THAT TITLE.)

## N. REMEDIES. (POSSESSION, B.)

A contract under the seal of the party is not distinguished, by the law of Louisiana, from one without a seal, and a party seeking a remedy there, must be governed by this law. *Wilcox v. Hunt*, 13 P. 378....xiii. 211.

ASSUMPSIT, A. 2; *Supra*, G. 2.

## O. WILLS.

1. A testamentary paper executed in a foreign country, even if executed so as to give it the effect of a last will and testament by the foreign law, cannot be made the foundation of a suit for a legacy in the courts of this country, until it has received probate here, in the court having the peculiar jurisdiction of the

probate of wills and other testamentary matters. *Armstrong v. Lear*, 12 W. 169 . . . .vii. 102.

2. By the law of France, in 1816, a will could be revoked by a subsequent will or an act before a notary, declaring that intention. *Ennis v. Smith*, 14 H. 400 . . . .xx. 251.

*Supra*, E. 8.

## CONQUEST.

LAW OF NATIONS, E.

## CONSIDERATION.

ASSUMPSIT, B.

Where a bill alleged that a deed was made wholly without consideration, and the deed purported to be for the nominal consideration of one dollar, evidence was held to be admissible to prove that \$2,000 was paid, though not specifically alleged in the answer. *Jenkins v. Pye*, 12 P. 241 . . . .xii. 712.

ASSIGNMENT OF CHOSSES IN ACTION, A. 15; FRAUD, A. 2, 5, 6.

## CONSIGNOR AND CONSIGNEE.

AGENT.

*Prima facie* the consignee of goods under a bill of lading, has the legal title and a beneficial interest in the goods, and may sue the carrier for the non-delivery thereof. *Lawrence v. Minturn*, 17 H. 100 . . . .xxi. 892.

## CONSORTSHIP.

SALVAGE, A. 5.

## CONSTITUTIONAL LAW.

FOR POWERS OF THE UNITED STATES AS A BODY POLITIC, *see* UNITED STATES.  
See also COURTS OF THE UNITED STATES; CRIMINAL PROCEDURE, C.;  
JURISDICTION; JURY, C.; SUITS AT COMMON LAW.

A. THE LEGISLATIVE POWER OF CONGRESS AND ITS MODES OF EXERCISE, 101.

B. THE HOUSES OF CONGRESS, 108.



**C. THE EXECUTIVE POWER, 103.**

1. THE PRESIDENT AND SENATE, AND HEREIN OF TREATIES.
2. THE PRESIDENT.
3. THE HEADS OF DEPARTMENTS.
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**D. THE JUDICIAL POWER, 104.**

1. WHAT IS OR NOT WITHIN THE JUDICIAL POWER.
2. EXTENT OF, UNDER THE CONSTITUTION.

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**A. THE LEGISLATIVE POWER OF CONGRESS AND ITS MODES OF EXERCISE.**

**JUDGMENTS, &c. B. 3; PARTICULAR TITLES, *infra*; PATENTS, F. 3; PUBLIC LANDS OF THE UNITED STATES, I.**

1. An act of congress repugnant to the constitution is not law. *Marbury v. Madison*, 1 C. 137 . . . i. 368.

2. When the constitution and an act of congress are in conflict, the constitution must govern the case to which both apply. *Ib.*

3. The power to make all laws necessary and proper to carry into execution the powers granted, confers on congress a choice of means, and does not confine it to what is indispensably necessary. *United States v. Fisher*, 2 C. 358 . . . i. 496.

4. The compact between two States cannot deprive congress of the power to regulate the appellate jurisdiction of this court. *Wilson v. Mason*, 1 C. 45.... i. 346.

5. Congress has power to establish such inferior tribunals as it thinks proper, and to transfer pending proceedings from one such tribunal to another. *Stuart v. Laird*, 1 C. 299....i. 414.

6. Congress has power to legislate concerning the issuing of executions by the courts of the United States and the action of officers under the same. *Wayman v. Southard*, 10 W. 1....vi. 311.

7. Congress may make the revival of a law conditional upon a fact then contingent, and empower the President to declare, by his proclamation, that such fact has occurred, and the law is revived. *Brig Aurora v. United States*, 7 C. 382....ii. 583.

8. Congress has authority to impose a direct tax on the District of Columbia, in proportion to the census directed to be taken by the constitution. *Loughborough v. Blake*, 5 W. 317....iv. 643.

9. The power of congress to levy and collect taxes, duties, imposts, and excises, is coextensive with the territory of the United States. *Ib.*

10. The power of congress to exercise exclusive jurisdiction in all cases whatsoever within the District of Columbia, includes the power of taxing it. *Ib.*

11. Though the 8th section of the 1st article of the constitution only empowers congress to provide for the punishment of counterfeiting the securities and current coin of the United States, yet, as congress has power to coin money and to regulate the value thereof, and of foreign coin, it may also provide for the punishment of the offence of bringing into the United States, from a foreign place, false, forged, and counterfeit coins, made in the similitude of coins of the United States, and also for the punishment of the offence of uttering and passing the same; and the act of March 3, 1825, section 20, (4 Stats. at Large, 121,) is a constitutional and valid law. *United States v. Marigold*, 9 H. 560....xviii. 261.

12. Where the country occupied by one of the Indian tribes is not within a State, congress may enact laws to punish offences committed there, either by white persons or Indians. *United States v. Rogers*, 4 H. 567....xvi. 200.

13. The act to regulate trade and intercourse with the Indian tribes, &c., passed June 30, 1834, (5 Stats. at Large, 729,) by its 25th section, punishes the crime of murder committed within the country assigned to the Cherokees, unless committed by one Indian on another Indian; and a white citizen of the United States, who has been adopted by the tribe, and permanently domiciled among them, is not an Indian, within the meaning of this exception; he is liable to be tried for the crime of murder by the circuit court of the United States for the district of Arkansas. *Ib.*

14. Though the crimes act of April 30, 1790, (1 Stats. at Large, 112,) does not define the offence of endeavoring to make a revolt, it is competent for the court to give a definition of it. *United States v. Kelly*, 11 W. 417....vi. 645.

15. In what it consists. *Ib.*

16. The act incorporating the Bank of the United States, (3 Stats. at Large,

266,) is a law made in pursuance of the constitution. *M' Oulloch v. Maryland*, 4 W. 316....iv. 415.

17. The treaty of cession of Louisiana to the United States could not enlarge the constitutional powers of the latter, and those powers do not enable the United States to have or exercise that police control over public places within the State of Louisiana which belonged to the crown of France, or Spain. *New Orleans v. United States*, 10 P. 662....xii. 292.

18. If congress may decide the fact that an individual is an author or inventor, they have not done so in the act for the relief of Evans. (6 Stats. at Large, 70.) *Evans v. Eaton*, 3 W. 454....iv. 260.

NATURALIZATION, 1; PIRACY, 1; PRIORITY OF PAYMENT OF UNITED STATES, A. 5; TERRITORIES OF THE UNITED STATES, 2-4.

## B. THE HOUSES OF CONGRESS.

1. The house of representatives has jurisdiction to punish for a contempt. *Anderson v. Dunn*, 6 W. 204....v. 61.

2. A warrant of arrest under the hand and seal of the speaker, attested by the clerk, and directed to the sergeant-at-arms, is legal, though it does not show on its face on what evidence it was founded, nor set forth specially in what the alleged contempt consisted. *Ib.*

## C. THE EXECUTIVE POWER.

### 1. THE PRESIDENT AND SENATE, AND HEREIN OF TREATIES. (TREATIES.)

Though a treaty is a law of the land, and its provisions must be regarded by courts as equivalent to an act of the legislature when it operates directly on a subject, yet, if it be merely a stipulation for future legislation by congress, it addresses itself to the political and not to the judicial department, and the latter must await the action of the former. *Foster v. Neilson*, 2 P. 253....viii. 108.

### 2. THE PRESIDENT.

ADMIRALTY, A. 1; BOND, C. 2; *Infra*, D. 1.

1. The President acts, in many cases, through the heads of departments; and the secretary of war, having directed a section of land to be reserved for military purposes, the court presumed it to have been done by the direction of the President, and held it to be, by law, his act. *Wilcox v. Jackson*, 13 P. 498....xiii. 266.

2. The President has power to make and repeal rules and regulations for the government of the army, in respect to compensation for extra services, congress not having legislated thereon, and the secretary at war is the regular organ of the President for publicly promulgating such rules and regulations. *United States v. Eliason*, 16 P. 291....xiv. 304.

3. Under the act of January 31, 1823, (3 Stats. at Large, 723, § 1,) instructions given by the President to the secretary of the treasury, to make the necessary advances to the marshals of the United States to enable them to execute their duties, were legal, and for the moneys so advanced the sureties

of the marshals were responsible. *Williams v. United States*, 1 H. 290....xiv. 614.

4. Such duties can be performed by the President only through the agency of the appropriate departments. *Ib.*

5. Instructions from the President to the commander of a public armed vessel of the United States, to do an illegal act, do not justify the officer in doing it, nor so far excuse him as to exempt him from the payment of damages. *Little v. Barreme*, 2 C. 170....i. 465.

6. The act of February 28, 1795, (1 Stats. at Large, 424,) which confers power on the President to call forth the militia in certain exigencies, is a constitutional law, and the President is the exclusive and final judge whether the exigency has arisen. *Martin v. Mott*, 12 W. 19....vii. 10.

7. A requisition by him is an order, and it is not necessary in pleading to set out the order; it is enough to aver that it was made. *Ib.*

*Supra*, A. 7; PUBLIC LANDS OF THE UNITED STATES, I. 7, 8.

### 8. THE HEADS OF DEPARTMENTS.

POST OFFICE DEPARTMENT, A.; REVENUE LAWS, A. 2; SECRETARY OF THE TREASURY.

The head of a department has not a right to review the decision of his predecessor, allowing a credit, except to correct some error of calculation; if he is of opinion that the allowance was wrongful, he must have a suit brought. *United States v. Bank of the Metropolis*, 15 P. 377....xiv. 114.

### 4. OFFICERS OF THE UNITED STATES.

#### RECEIVERS OF PUBLIC MONEY.

A justice of the peace within the District of Columbia, is an officer of the United States, within the meaning of that clause of the act of congress, (1 Stats. at Large, 272, § 2,) exempting certain persons from the performance of militia duties, and is not subject to the jurisdiction of a court-martial. *Wise v. Withers*, 3 C. 831....i. 597.

### D. THE JUDICIAL POWER.

#### 1. WHAT IS OR NOT WITHIN THE JUDICIAL POWER.

MINISTERIAL AND JUDICIAL; PUBLIC LANDS OF THE UNITED STATES, IV. E.

1. The judicial department must determine the construction of all laws involved in cases before them, according to their own views; and though a construction by the treasury department of an act of congress affecting its business, is treated with respect, yet it is necessarily *ex parte*, and cannot conclude the judgment of a court of justice. *United States v. Dickson*, 15 P. 141...xiv. 54.

2. The power proposed to be conferred on the circuit courts of the United States by the act of March 23, 1792, (1 Stats. at Large, 243,) was not judicial power within the meaning of the constitution, and was, therefore, unconstitutional,

and could not lawfully be exercised by the courts. *United States v. Todd*, in note to *United States v. Ferreira*, 13 H. 40 . . . .xix. 373, 380.

3. As the act of congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners. *Ib.*

4. Money paid under a certificate from persons not authorized by law to give it, might be recovered back by the United States. *Ib.*

5. An act of congress having authorized the district judge of the United States for Florida, to adjudicate on claims for injuries suffered by inhabitants of Florida, by the operations of the American army in Florida, which claims were to be paid, if the secretary of the treasury should, on a report of the evidence, deem it equitable; *Held*, not to be an authority to exercise any of the judicial power of the United States under the constitution; but that the judge acted as a commissioner, and no appeal lay to this court. *United States v. Ferreira*, 13 H. 40 . . . .xix. 373.

6. A territorial court held by judges whose appointments are for four years, cannot be the depository of any part of the judicial power conferred by the constitution on the general government. *American Insurance Company v. Three Hundred and Fifty-six Bales of Cotton*, 1 P. 511 . . . .vii. 685.

7. Whether a revolted colony is to be treated as a sovereign state, is a political question, to be decided by governments, not by courts of justice; and the courts of the United States must consider the ancient state of things as remaining, until the sovereignty of the revolted colony is acknowledged by the government of the United States. *Rose v. Himely*, 4 C. 241 . . . .ii. 87.

8. In a controversy between the United States and a foreign sovereign as to boundary, this court must follow the decision of that department of the government intrusted by the constitution with the care of its foreign relations, especially if sanctioned by the legislative power. *Foster v. Neilson*, 2 P. 253 . . . .viii. 108.

9. This principle applied to the title to that territory, lying between the rivers Iberville and Perdido, in dispute between the United States and Spain. *Ib.*

10. So it belonged to the executive and legislative branches of the government of the United States to determine the boundary between West Florida and Louisiana, and the judicial tribunals follow that determination. *Garcia v. Lee*, 12 P. 511 . . . .xii. 826.

11. The President, in a message to congress, and in the correspondence carried on with the government of Buenos Ayres, having denied the jurisdiction of that country over the Falkland Islands, the courts must take the fact so to be. *Williams v. Suffolk Insurance Company*, 18 P. 315 . . . .xiii. 225.

12. The defendant justified, in an action of trespass, for that martial law had been declared by the legislature of the State, and he being a military officer, and acting under the orders of his superior officer, had broken, &c. as he lawfully might, &c. And upon a question whether the government, which declared martial law, was the duly constituted government of the State, it was *held*, that the circuit court had not power to try and determine this question, which, so far as the United States was concerned, belonged to the political, and not to the judicial power; and, so far as the State was concerned, having

been decided by the highest court of the State, acting as part of the government of the State, when admitted to be duly constituted, the circuit court was bound to follow its decision. *Luther v. Borden*, 7 H. 1....xvii. 1.

13. Congress has delegated to the President, by the act of February 28, 1795, (1 Stats. at Large, 424,) the power to decide for the purposes of that act, whether a government, organized in a State, is the duly constituted government of that State; and after he has decided this question, the courts of the United States are bound to follow his decision. *Ib.*

14. It is sometimes difficult to draw the line of division which separates executive, legislative, and judicial powers; but a special act of the legislature, authorizing an administratrix to sell land and apply the proceeds to the payment of debts, is not an exercise of judicial power. *Watkins v. Holman's Lessee*, 16 P. 25....xiv. 174.

15. Such an authority may be conferred without notice to heirs, who take the lands of their ancestor subject to the payment of his debts, and to the remedies, general or special, which the legislature may provide for creditors in that behalf. *Ib.*

16. If a court of law can, in any case, inquire into the motives of members of the legislature for voting for a law, it cannot do so collaterally, in a suit between individuals, to which the State is not a party. *Fletcher v. Peck*, 6 C. 87....ii. 328.

LAW OF NATIONS, E. 3, 4, 5; PUBLIC LANDS OF THE UNITED STATES, I. 8

## 2. EXTENT OF, UNDER THE CONSTITUTION.

ADMIRALTY, A.; JURISDICTION, *passim*; STATE COURTS, &c. A. 4.

1. The article of the constitution which describes the judicial power, and extends it to cases of admiralty and maritime jurisdiction, does not make a cession of territory or of general jurisdiction, so as to vest in the United States the shores of the sea below low-water mark. *United States v. Bevens*, 3 W. 336....iv. 231.

2. The 25th section of the judiciary act (1 Stats. at Large, 85,) is a constitutional and valid law. *Martin v. Hunter's Lessee*, 1 W. 304....iii. 562; *Cohens v. Virginia*, v. 82.

3. It applies to and includes a case in which a State proceeds in its own court, by indictment, against one of its citizens, who attempts to defend under an act of congress; and this court, upon the writ of error, will determine whether or no the act of congress constituted a defence. *Cohens v. Virginia*, 6 W. 264....v. 82.

4. Before a law can be pronounced unconstitutional, its incompatibility with the constitution must be clear. *Fletcher v. Peck*, 6 C. 87....ii. 328.

BANK OF UNITED STATES, 2; *Supra*, A. 13, 14.

## E. PUBLIC ACTS, RECORDS AND JUDICIAL PROCEEDINGS, THEIR AUTHENTICATION AND EFFECT.

EVIDENCE, G. 2.

1. A judgment in one State has the force of a domestic judgment in another,

under the constitution of the United States, only so far as to preclude all inquiry into the merits of the subject-matter of the judgment. *M'Elmoyle v Cohen*, 13 P. 312....xiii. 169.

2. The act of May 26, 1790, (1 Stats. at Large, 122,) does not apply to a judgment recovered against a non-resident joint debtor, without notice to him; and such a judgment is not entitled to any faith or credit out of the State in which it was rendered. *D'Arcy v. Ketchum*, 11 H. 165....xviii. 586.

3. The act of May 26, 1790, (1 Stats. at Large, 122,) providing for the authentication of records, &c., though it makes a judgment regularly recovered in another State, and duly authenticated, conclusive evidence of an established demand, as of the date of such judgment, does not prevent the several States from enacting statutes of limitation, barring actions on such judgments in their courts; and the courts of the United States, sitting in a State where such a statute exists, must apply it, in an action at law. *Bank of the State of Alabama v. Dalton*, 9 H. 522....xviii. 249.

CONFLICT OF LAWS, A. 8; EXECUTORS, &c. A. 19.

#### F. FUGITIVES FROM JUSTICE AND SERVICE. (See THAT TITLE.)

1. Under and in virtue of the constitution of the United States, the owner of a slave is clothed with entire authority, in every State of the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence. *Prigg v. Pennsylvania*, 16 P. 539....xiv. 417.

2. The last clause of the 2d section of the 4th article of the constitution of the United States confers on congress an exclusive power to legislate concerning the extradition of fugitive slaves, and the act of February 12, 1793, (1 Stats. at Large, 302,) is a constitutional and valid law. *Ib.*

3. The act of Pennsylvania of March 26, 1826, is in conflict with the constitution of the United States, and a conviction under it was reversed as erroneous. *Ib.*

4. The same act may be an offence against a law of a State, and against another law of the United States. *Moore v. Illinois*, 14 H. 13....xx. 6.

#### G. TERRITORY AND PUBLIC PROPERTY OF THE UNITED STATES.

*Supra*, A.; PUBLIC LANDS OF THE UNITED STATES; TERRITORIES OF THE UNITED STATES.

#### H. EX POST FACTO LAWS. (*Infra*, K.)

1. A resolution, or law of the State of Connecticut, setting aside a decree of a court of probate, and granting a new hearing before the same court, with liberty of appeal, is not an *ex post facto* law, within the meaning of the 10th section of the 1st article of the constitution of the United States. *Calder v. Bull*, 3 D. 386....i. 269.

2. That article has reference only to crimes. *Ib.*

3. A law of Pennsylvania, passed after the death of one of its citizens, the effect of which is to compel his executors to pay from property in their hands to be administered in Pennsylvania, a tax on property out of that State, bequeathed to citizens of other States, is not an *ex post facto* law, within the



meaning of the constitution of the United States. *Carpenter v. Pennsylvania*, 17 H. 456....xxi. 610.

## I. DIRECT TAXES.

A tax on carriages, under the act of June 5, 1794, (1 Stats. at Large, 373,) is not a direct tax, and so not required by the constitution to be laid according to the census. *Hylton v. United States*, 3 D. 171....i. 150.

## J. OF LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

*Infra*, L.; CORPORATIONS, D. 1, H.

1. The present constitution of the United States did not commence its operation until the first Wednesday in March, 1789; and the provision in the constitution that "no State shall make any law impairing the obligation of contracts," does not extend to a state law enacted before that day, and operating upon rights of property vested before that time. *Owings v. Speed*, 5 W. 420....iv. 688.

2. The prohibition, in the constitution of the United States, against state laws which impair the obligation of contracts, does not affect laws of Texas, passed and taking complete effect before the admission of that country as a State into the Union. *League v. De Young*, 11 H. 185....xviii. 593.

3. A state law which makes valid a void contract, does not impair the obligation of a contract within the meaning of the constitution of the United States. *Satterlee v. Matthewson*, 2 P. 380....viii. 147.

4. Contracts made by a State, are within the constitution of the United States. *Fletcher v. Peck*, 6 C. 87....ii. 328.

5. When a law is a contract, a repeal of that law cannot take away rights vested under that contract. *Ib.*

6. A grant implies a contract by the grantor, not to reassert the title granted. *Ib.*

7. And a legislative grant cannot be repealed. *Town of Pawlet v. Clarke*, 9 C. 292....iii. 358; *Terrett v. Taylor*, 9 C. 43....iii. 249.

8. So a grant, made in pursuance of a contract, is an executed contract, and its obligations cannot be impaired by a law of a State. *Fletcher v. Peck*, 6 C. 87....ii. 328.

8a. If a legislature make a grant of lands in fee-simple, a subsequent legislature cannot take away the title of a *bond fide* purchaser for a valuable consideration from the first grantee, upon the ground that the grant to the latter was fraudulent. *Ib.*

9. A patent of land from a State does not amount to a contract that the patentee and his assigns shall enjoy the land free from all legislative regulations in violation of the constitution of the State, but only that the State will not impair the force of the grant; and a law erecting a commission to try conflicting titles held under the patentee, though repugnant to the state constitution, does not impair the obligation of a contract. *Jackson v. Lamphire*, 3 P. 280....viii. 419.

9a. A law granting to a town the right to keep a ferry across a public river, does not amount to a contract between the State and the town, so as to preclude the legislature from revoking the grant. *East Hartford v. Hartford Bridge Company*, 10 H. 511....xviii. 483.

10. In November, 1836, the legislature of Arkansas chartered a banking corporation, of which the State was to be the sole stockholder, and the 28th section of its charter provided, "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas;" *held*, that this constituted a contract with the holders of such bills, to receive the same in payment of state dues, the obligation of which was impaired, by a law passed in 1845, repealing that clause in the charter. *Woodruff v. Trapnall*, 10 H. 190....xviii. 358.

11. The decision in the next preceding case, *Woodruff v. Trapnall*, 10 H. 190, held inapplicable to a case where the debt due to the State was expressly made payable "in specie, or its equivalent." *Paup v. Drew*, 10 H. 218....xviii. 372.

12. The decision in the next preceding case, *Paup v. Drew*, 10 H. 218, held applicable to this case. *Trigg v. Drew*, 10 H. 224....xviii. 376.

13. An appointment to an office which, by the then existing law of Pennsylvania, was to be held for one year, with a compensation of four dollars per day, does not amount to a contract by the State thus to employ and pay the officer during the year; and a law which repeals the former act, and removes the officer, and changes the rate of compensation, does not impair the obligation of any contract. *Butler v. Pennsylvania*, 10 H. 402....xviii. 435.

14. A legislative act, passed in consideration of a release of title by the Indians, declaring that certain lands which should be purchased for the Indians should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act; such repealing act being void under that clause of the constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts. *New Jersey v. Wilson*, 7 C. 164....ii. 498.

15. The Wheeling bridge is an obstruction of the free navigation of the Ohio by vessels propelled by steam. And a law of the State of Virginia authorizing this obstruction was inoperative, 1. Because it impaired the obligation of the compact between Virginia and Kentucky, that the use and navigation of the Ohio, so far as the territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States. 2. Because it is in conflict with the legislation of congress which regulates the commerce among different States and with foreign nations carried on upon this river. *Pennsylvania v. Wheeling and Belmont Bridge Co.* 13 H. 518....xix. 621.

16. The State of Pennsylvania, as the proprietor of public works, suffers special damage in its property, by reason of this public nuisance, and this damage is continued from day to day, is not capable of proof and computation in each item thereof, and so is not reparable by the course of the common law, and in such a case a bill in equity, by the State, lies, to enjoin the nuisance. *Id.*

17. But, if by the construction and use of a suitable and practicable draw, the navigation of the river should be restored to such a condition as, in the

judgment of the court, renders it free from unreasonable obstruction, the bridge should not be treated as a nuisance. *Ib.*

18. The acts of Virginia of 1798, c. 9, and 1801, c. 5, so far as they go to divest the Episcopal church of the property acquired previous to the Revolution, by purchase or donation, are unconstitutional, and inoperative. *Terrett v. Taylor*, 9 C. 43....iii. 249.

19. The charter granted by the British crown to the trustees of Dartmouth College, in New Hampshire, in the year 1769, is a contract within the meaning of that clause of the constitution of the United States, which declares that no State shall make any law impairing the obligation of contracts. The charter was not dissolved by the Revolution. *Trustees of Dartmouth College v. Woodward*, 4 W. 518....iv. 463.

20. An act of the State legislature of New Hampshire, altering the charter, without the consent of the corporation, in a material respect, is an act impairing the obligation of the charter, and is unconstitutional and void. *Ib.*

21. The act of the legislature of Vermont, of the 30th of October, 1794, granting the lands in that State, belonging to "The Society for Propagating the Gospel in Foreign Parts," to the respective towns in which the lands lie, is void, and conveys no title under it. *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, 8 W. 464....v. 483.

22. The charter of the Charles River Bridge Corporation not containing any express contract that the State would not authorize another bridge to be built to the injury of the corporation, *Held*, that no such contract could be implied, and that a law empowering another corporation to erect and maintain a free bridge, so near to the first as practically to deprive the first corporation of all tolls, was not a law impairing the obligation of any contract. *Charles River Bridge v. Warren Bridge*, 11 P. 420....xii. 496.

23. A bridge, erected and owned by a private corporation, and held for the purpose of exercising the franchise granted by its charter, to take toll for passing the same, may be taken and laid out as a part of a public highway, under a general law of the State, authorizing the act, compensation being adjusted and made to the corporation in the same manner as to natural persons for taking their property; and such a law, so applied, does not impair the obligation of any contract. *West River Bridge Company v. Dix*, 6 H. 507....xvi. 793.

24. A law prohibiting any bank from transferring by indorsement, or otherwise, any note, bill receivable, or other evidence of debt, impairs the obligation of a contract between the State and an existing bank, empowered by its charter to acquire and dispose of goods, chattels, and effects, of what kind soever, nature and quality, and to discount bills and notes. *Planters' Bank of Mississippi v. Sharp*, 6 H. 301....xvi. 697.

25. The legislature of Virginia, in 1829, authorized a turnpike corporation to raise money by a lottery to repair a part of the turnpike; it was manifestly an authority to be used without delay; in 1834, it not having been used, by another act it was provided that six years should be allowed for that purpose. *Held*, that this limitation did not impair the obligation of any contract. *Phalen v. Virginia*, 8 H. 163....xvii. 539.

26. A clause, in a charter of a railroad corporation, enabling them to have

land condemned to their use on payment of the valuation found by an inquisition, does not prevent the legislature from passing an act requiring the court to set aside an inquisition, found in 1836, confirmed in 1837, but under which the company made no payment or tender, until after the passage of the act in 1841. *Baltimore and Susquehannah Railroad Company v. Nesbit*, 10 H. 395 . . . .xviii. 428.

27. Such an act does not impair the obligation of any complete contract, in existence when it was passed. *Ib.*

28. A law of the State of Rhode Island, imposing a tax upon the capital stock of a bank, does not impair the obligation of the contract arising from its charter, which contains no stipulation on the subject of taxation. *Providence Bank v. Billings*, 4 P. 514 . . . .ix. 171.

29. Where the legislature of a State accepted from banking corporations a bonus, as a consideration for the franchise granted, and pledged the faith of the State "not to impose any further tax or burden upon them, during the continuance of their charters under this act,"—*Held*, that a tax upon the stockholders, by reason of their stock, was a violation of this contract, and the tax was illegal. *Gordon v. Appeal Tax Court*; *Oheston v. Appeal Tax Court*, 3 H. 133 . . . .xv. 338.

30. But the exemption lasted only during the continuance of the charters under that act, and when extended without any such promise, the power to tax revived. *Ib.*

31. The legislature of a State, if not restrained by its constitution, may make a valid and binding contract with a banking corporation, in its charter, that no more than a specified amount of taxes shall be levied on its property during a term of years; and a succeeding legislature has not power to pass a law impairing the obligation of such contract. *State Bank of Ohio v. Knoop*, 16 H. 369 . . . .xxi. 190.

32. Upon the construction of a banking law of Ohio, involved in this case, *held*, that it was not merely declaratory of the intentions of the legislature, but amounted to a contract. *Ib.*

33. The principles involved in the preceding decision (*State Bank of Ohio v. Knoop*, 16 H. 369,) further explained, and applied to this case; but the legislation of Ohio, respecting the taxation of the plaintiffs, held not to amount to a contract, the obligation of which had been impaired. *Ohio Life Insurance and Trust Company v. Debolt*, 16 H. 416 . . . .xxi. 230.

34. The State of Maryland passed a law to subscribe \$1,000,000 to the stock of the Baltimore and Ohio Railroad Company, and providing that, if the company should be located so as to pass through certain towns in the county of Washington, the company should forfeit \$1,000,000 to the State, for the use of Washington county. The company assented to this law, as part of its charter. *Held*, that this was a law inflicting a penalty; that nothing was due to the county by contract, and that the State could release and had released the penalty by a subsequent law to that effect. *Maryland v. Baltimore and Ohio Railroad Company*, 3 H. 534 . . . .xv. 541.

35. The insolvent law of Maryland cannot discharge one of its own citizens from a contract made by him in New York, with citizens of that State. *Cook v. Moffat*, 5 H. 295 . . . .xvi. 405.

36. The act of the legislature of the State of New York, passed on the 3d of April, 1811, (which not only liberates the person of the debtor, but discharges him from all liability for any debt contracted previous to his discharge, on his surrendering his property in the manner it prescribes,) so far as it attempts to discharge the contract, is a law impairing the obligation of contracts within the meaning of the constitution of the United States, and is not a good plea in bar of an action brought upon such contract, in a court, the proceedings of which the legislature which passed the law had no right to control, and in a case where the creditor had not proceeded to execution against the body of his debtor within the State of New York. *Sturges v. Crowninshield*, 4 W. 122 . . . .iv. 362.

37. An act of a state legislature which discharges a debtor from all liability for debts contracted previous to his discharge, on his surrendering his property for the benefit of his creditors, is a law impairing the obligation of a contract previously made, within the meaning of the constitution of the United States, so far as it attempts to discharge the contract; and it makes no difference, in such a case, that the suit was brought in a state court of the State of which both parties were citizens, where the contract was made, and the discharge obtained, and where they continued to reside until the suit was brought. *Farmers and Mechanics' Bank of Pennsylvania v. Smith*, 6 W. 131 . . . .v. 37.

38. The right to imprison a debtor constitutes no part of the contract, and a discharge therefrom does not impair its obligation. *Beers v. Haughton*, 9 P. 329 . . . .xi. 376.

39. A law, which deprives creditors of a corporation of all legal remedy against its property, impairs the obligation of its contracts, and is invalid. *Curran v. Arkansas*, 15 H. 304 . . . .xx. 524.

40. The obligation of the contracts of a corporation is not impaired by its dissolution — 1. Because its creditors contracted with reference to such a possibility; 2. Because their obligation survives, and they may be prosecuted against any property of the corporation which has not passed into the hands of *bona fide* purchasers. *Mumma v. Potomac Company*, 8 P. 281 . . . .xi. 102.

41. It is competent for a State to provide for the only practicable and equitable mode of distributing the assets of a dissolved corporation among its creditors, analogous to the distribution of the assets of a deceased insolvent debtor. *Ib.*

42. A retrospective law, which enables banking corporations to sue in their own names on notes payable to their cashiers, does not impair the obligation of a contract. *Crawford v. Branch Bank of Mobile*, 7 H. 279 . . . .xvii. 120.

43. A mortgage contained a power to the creditor to sell on breach of the condition, and thereby pay the debt; this power was valid under the laws of the State when given. *Held*, that a law, subsequently passed, giving the mortgagor twelve months to redeem the property from the purchaser at such a sale, and prohibiting it from being made for less than two thirds of its appraised value, so altered the remedy of the creditor, as to impair the obligation of the contract. *Bronson v. Kinzie*, 1 H. 311 . . . .xiv. 628.

44. A state law, which prohibits property from being sold on execution for less than two-thirds the valuation made by appraisers, pursuant to the directions contained in the law, impairs the obligation of contracts, and is inoperative upon

executions issuing on judgments founded on contract. *Mc Cracken v. Hayward*, 2 H. 608 . . . . xv. 228.

45. As to existing mortgages, foreclosable by a sale, the legislature could not prohibit the sale for less than half the appraised value of the land, because such a law impairs the obligation of a contract. *Gantley's Lessee v. Ewing*, 3 H. 707 . . . . xv. 608.

BOND, B. 4; COMPACTS OF STATES, 2, 12, 13; CONFLICT OF LAWS, B. 5;  
*Infra*, K. 6; EXECUTORS, D. 2.

## K. RETROSPECTIVE LAWS.

1. Retrospective laws, which do not impair the obligation of a contract, or partake of the character of *ex post facto* laws, are not forbidden by the constitution of the United States. *Satterlee v. Matthewson*, 2 P. 380 . . . . viii. 147.

2. A state law may be retrospective and divest vested rights, and yet not violate the constitution of the United States. *Charles River Bridge v. Warren Bridge*, 11 P. 420 . . . . xii. 496.

3. An act of the legislature of Tennessee, providing that where a deed had been *de facto* registered for more than twenty years, it should be deemed and taken to have been lawfully registered, though operating in respect to deeds registered before, and offered in evidence after its passage, is not a retrospective law, within the meaning of the constitution of that State. *Webb v. Den*, 17 H. 576 . . . . xxi. 694.

4. The title of heirs in Rhode Island is subject to be divested by a sale for the payment of debts; and a sale for this purpose having been made, in good faith, by a person acting without previous authority, there is nothing in the nature of the act which prevents the legislature of Rhode Island from granting the power to sell, and there is nothing in the title of the heirs to prevent a subsequent confirmation from being equivalent to a previous authority. *Wilkinson v. Leland*, 2 P. 627 . . . . viii. 238.

5. The act of the general assembly of Rhode Island, confirming a deed of an executrix, had the effect to make the title of the grantee good as against the heirs of the testator, without regard to extraneous facts respecting his debts, or the application of the purchase-money. *Leland v. Wilkinson*, 16 P. 294 . . . . xii. 127.

6. An act of the legislature of Pennsylvania, making valid deeds of land which were void from a defective statement of the particulars of their acknowledgment by husband and wife, though retroactive, does not impair the obligation of a contract, is not an *ex post facto* law, and is not repugnant to any provision of the constitution of the United States. *Watson v. Mercer*, 8 P. 88 . . . . xi. 38.

## L. INSOLVENT AND BANKRUPT LAWS.

1. An insolvent law of a State does not impair the obligation of future contracts between its citizens. *Ogden v. Saunders*, 12 W. 213 . . . . vii. 132.

2. But it cannot affect the rights of creditors who are citizens of other States. *Ib.*



3. The decision in *Ogden v. Saunders* applies, where the action is brought in the court of some other State than the one where the discharge has been obtained. *Shaw v. Robbins*, 12 W. 369 . . . . vii. 226, n.

4. The ultimate opinion delivered by Mr. Justice Johnson, in the case of *Ogden v. Saunders*, 12 W. 258, was concurred in and adopted by the three judges who were in the minority on the general question, and has settled the law involved therein. *Boyle v. Zacharie*, 6 P. 348, 635 . . . . x. 142, 291.

5. A discharge under the act of assembly of Rhode Island, of 1756, from all debts, duties, contracts, and demands, outstanding at the time of such discharge, upon surrender of all the debtor's property, will not protect him against a debt contracted in a foreign country. *Clark's Executor v. Van Reimsdyk*, 9 C. 153 . . . . iii. 304.

*Supra*, J. 35-38; *Infra*, P. 6; INSOLVENT LAWS, B. 9.

#### M. IMPOSITION OF DUTIES AND IMPOSTS, AND THE REGULATION OF COMMERCE.

1. The power to regulate commerce includes the power to regulate navigation, and does not stop at the external boundary of a State. *Gibbons v. Ogden*, 9 W. 1 . . . . vi. 1.

2. It does not comprehend that commerce which is completely internal. *Ib.*

3. The laws of New York, which grant to Livingston and Fulton the exclusive right to navigate all the waters within the jurisdiction of that State, with boats moved by steam or fire, for a term of years, are inoperative as against the laws of the United States regulating the coasting trade, and cannot restrain vessels licensed to carry on the coasting trade under the laws of the United States, from navigating those waters in the prosecution of that trade. *Ib.*

4. A state law requiring an importer to take a license and pay fifty dollars, before he should be permitted to sell a package of imported goods, is in conflict with that provision of the constitution of the United States which prohibits a State from laying any impost, &c., and also with the clause which declares that congress shall have power to regulate commerce, &c. *Brown v. Maryland*, 12 W. 419 . . . . vii. 262.

5. In the absence of all legislation by congress, a State has power to improve its lands, and promote the public health, by authorizing a dam to be built across a creek, though it was previously navigable from the sea by vessels enrolled and licensed for the coasting trade. *Willson v. Blackbird Creek Marsh Company*, 2 P. 245 . . . . viii. 105.

6. The power to regulate commerce not having been so exercised as to affect the question, its mere existence does not render the law of the State inoperative. *Ib.*

7. Laws for the regulation of pilots and pilotage, are not laws laying imposts, or duties on imports, or exports, or tonnage, within the meaning of the tenth section of the first article of the constitution of the United States, if they do not pass the appropriate line which limits laws for the regulation of the pilots and pilotage; and they cannot be considered as passing that line because they require the payment of half pilotage fees by certain vessels, which decline to receive a pilot, and not by others, nor because the sums thus received go to form



a charitable fund for distressed or decayed pilots, their widows and children. *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 H. 299.... xix. 143.

8. A regulation of pilots and pilotage is a regulation of commerce, within the grant to congress of the commercial power, contained in the eighth section of the first article of the constitution. *Ib.*

9. The mere grant to congress of the power to regulate commerce, did not prevent the States from regulating pilots ; and the legislation of congress, with a single exception, is such, that state regulations may be made, without conflicting with the will of congress in making regulations, or in leaving individuals to their own unrestricted action. *Ib.*

10. A state law, granting to an individual an exclusive right to navigate the upper waters of the Penobscot River, lying wholly within the limits of the State, separated from tide water by falls impassable for purposes of navigation, and not forming a part of any continuous track of commerce between two or more States, or with a foreign country, is not repugnant to the constitution or any law of the United States. *Veazie v. Moor*, 14 H. 568....xx. 345.

*Supra*, J. 15 ; *Infra*, N. 3-7, P. 9 ; CRIMINAL LAW, A. 3, 4 ; STEAMBOATS, 1.

#### N. LAWS OF STATES WHICH ARE OR ARE NOT IN CONFLICT WITH A TREATY OR LAW OF THE UNITED STATES, OR IN DEROGATION OF SOME POWER OF THE GOVERNMENT OF THE UNION.

*Supra*, M. ; COURTS OF THE UNITED STATES, B. a. 1, 2.

1. An act of a state legislature cannot determine whether a court of the United States has jurisdiction. *United States v. Peters*, 5. C. 115....ii. 206.

2. A state law, punishing the offence of fraudulently passing a counterfeit dollar, is not repugnant to the constitution, or any law of the United States. *Fox v. Ohio*, 5 H. 410....xvi. 447.

3. On trial of an indictment founded on the 47th chapter of the Revised Statutes of Massachusetts, and on a statute of that State passed in 1837, c. 242, regulating the sale of ardent spirits, it appeared upon the trial that some of the sales charged were of foreign liquors ; and the court charged the jury that the license laws of the State applied to retail sales of foreign liquors, and that such laws were not repugnant to the constitution or laws of the United States. *Held*, that so much of this instruction as related to the validity of these laws was correct. *License Cases*, 5 H. 504....xvi. 513.

4. The same decision was made in another case, under a similar law, of the State of Rhode Island. *Ib.*

5. In the third case, it was held that a law of New Hampshire, the effect of which was to prohibit the sale, without license, of a barrel of gin, purchased by the defendant in Massachusetts, and by him imported into New Hampshire, was not repugnant to the constitution or laws of the United States. *Ib.*

6. A state law, which requires the masters of vessels engaged in foreign commerce, to pay a certain sum to a state officer, on account of every passenger brought from a foreign country into the State, or before landing any alien pas-

senger in the State, is inoperative, by reason of its conflict with the constitution and laws of the United States. *Smith v. Turner*; *Norris v. Boston*; *Passenger Cases*, 7 H. 283 . . . xvii. 122.

7. A state law which imposes a tax on exchange and money brokers is not repugnant to the constitutional power of congress to regulate commerce. *Nathan v. Louisiana*, 8 H. 73 . . . xvii. 505.

8. A law of the State of Louisiana, imposing a tax on legacies payable to aliens, is not repugnant to the constitution of the United States. *Mager v. Grima*, 8 H. 490 . . . xvii. 667.

9. A tax on stock of the United States, held by an individual citizen of a State, is a tax on the power to borrow money on the credit of the United States, and cannot be levied by or under the authority of a State, consistently with the constitution. *Weston v. City Council of Charleston*, 2 P. 449 . . . viii. 171.

10. A State law imposing a tax on the operations of the bank of the United States, is unconstitutional. *McCulloch v. Maryland*, 4 W. 316 . . . iv. 415.

11. Or on one of its branches. *Osborn v. Bank of the United States*, 9 W. 738 . . . vi. 251.

*Supra*, F. 4, J. 15, M. 3-10; FUGITIVES FROM JUSTICE AND SERVICE, 2; INDIANS, A. 2.

## O. LAWS OF THE SEVERAL STATES IN REFERENCE TO THE CONSTITUTIONS OF THE SEVERAL STATES.

*Supra*, D. 1.

1. An act of the legislature of Maine, which so changes the law of disseisin as to bar a legal title, which is good and valid at the time of the passage of the act, is inoperative as against such a title, because in conflict with the constitution of the State. *Webster v. Cooper*, 14 H. 488 . . . xx. 296.

2. The legislature having ordered a ferry, which came in competition with a toll bridge, to be discontinued, in consideration that the proprietors of the bridge would incur certain expenses for the public benefit, and on the faith of such discontinuance these expenses having been incurred, held, in conformity with the decision of the highest court of the State, that the legislature could not restore the ferry without violating the constitution of the State. *East Hartford v. Hartford Bridge Company*, 10 H. 511 . . . xviii. 483.

3. And the town continuing to use the ferry, was held liable to the company for the damages caused by such continuance. *East Hartford v. Hartford Bridge Company*, 10 H. 541 . . . xviii. 499.

4. The act of assembly of Maryland, of 1793, c. 30, incorporating the Bank of Columbia, and giving to the corporation a summary process by execution, in the nature of an attachment, against its debtors who have, by an express consent, in writing, made the bonds, bills, or notes by them drawn or indorsed, negotiable at the bank, is not repugnant to the constitution of the United States or of Maryland. *Bank of Columbia v. Okeley*, 4 W. 235 . . . iv. 387.

5. The act of Virginia of 1776, confirming to the church its rights to lands, was not inconsistent with the constitution or bill of rights of Virginia; nor did

the acts of 1784, c. 88, and 1785, c. 37, infringe any of the rights intended to be secured under the constitution, either civil, political, or religious. *Terrett v. Taylor*, 9 C. 43....iii. 249.

6. An act of the legislature of the State of Georgia, passed in 1782, banishing the plaintiff in error from that State, and confiscating his property, is not repugnant to the constitution of that State. *Cooper v. Telfair*, 4 D. 14....i. 314.

7. By the constitution of Georgia, of 1789, the legislature had power to dispose of the unappropriated lands within its limits. *Fletcher v. Peck*, 6 C. 87....ii. 328.

#### P. POWERS OF STATES NOT CONTROLLED BY THE CONSTITUTION, TREATIES, OR LAWS OF THE UNITED STATES.

1. The several States composing the Union, became entitled, on the 4th of July, 1776, to all the rights and powers of sovereign States, so far at least as respects their internal regulations; and among those rights was that of the allegiance of their citizens. *M'Ilvaine v. Coxe's Lessee*, 4 C. 209....ii. 74.

2. By the Revolution, the State of Vermont succeeded to all the rights of the crown to the unappropriated, as well as appropriated glebes. *Town of Pawlet v. Clarke*, 9 C. 292....iii. 358.

3. By the statute of Vermont of 30th October, 1794, the respective towns became entitled to the property of the glebes therein situated. *Ib.*

4. There is nothing in the constitution of the United States which forbids the legislature of a State from exercising judicial functions. *Satterlee v. Matthewson*, 2 P. 380....viii. 147.

5. The provision in the 5th amendment of the constitution, declaring that private property shall not be taken for public use without just compensation, is only a limitation of the power of the United States; it is not applicable to the legislation of the several States. *Barron v. City of Baltimore*, 7 P. 243....x. 464.

6. Since the adoption of the constitution of the United States, a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the constitution, art. 1, § 10, and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law. *Sturges v. Crowninshield*, 4 W. 122....iv. 362.

7. It is competent for a state legislature to deprive the plaintiff in ejectment of a right to recover mesne profits in that form of action. *Society for the Propagation of the Gospel, &c. v. Pawlet*, 4 P. 480....ix. 160.

8. The State of Pennsylvania, having liens upon lands of its debtor, by judgments and other proceedings, but there being no mode, under the existing law, of procuring payment out of the lands, passed a special act subjecting enough of the lands to sale, on process to be issued by the governor, to satisfy the debts. *Held*, that this law was not in conflict with the constitution of the United States, or with that of Pennsylvania. *Livingston's Lessee v. Moore*, 7 P. 469....x. 546.

9. The act of the State of New York, which inflicts a penalty upon the master of a vessel arriving from a foreign port, who neglects to report to the mayor, or recorder, an account of his passengers, is not a regulation of commerce, but of police, and is not in conflict with the constitution of the United States. *New York v. Miln*, 11 P. 102....xii. 357.

10. The act of the State of Pennsylvania, of the 28th of March, 1814, providing (sec. 21,) that the officers and privates of the militia of that State, neglecting or refusing to serve, when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of congress of the 28th of February, 1795, (1 Stats. at Large, 424,) or to any penalty which may have been prescribed since the date of that act, or which may hereafter be prescribed by any law of the United States, and also providing for the trial of such delinquents by a state court-martial, and that a list of the delinquents fined by such court should be furnished to the marshal of the United States, &c., and also to the comptroller of the treasury of the United States, in order that the further proceedings directed to be had thereon by the laws of the United States might be completed, is not repugnant to the constitution and laws of the United States. *Houston v. Moore*, 5 W. 1....iv. 535.

*Supra*, J. 2, 3, 13, 26, 27, K. 6.

#### Q. BILLS OF CREDIT.

1. To constitute a bill of credit within the constitution, it must be issued by a State, involve the faith of the State, and be designed to circulate as money, on the credit of the State, in the ordinary uses of business. *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 P. 257....xii. 418.

2. Notes issued and payable in gold and silver by the Bank of the Commonwealth of Kentucky, a corporation created by a law of that State, having capital, which the holders of the notes could resort to for payment, containing no promise by the State, are not bills of credit within the constitution, although the State was the sole stockholder of the bank. *Ib.*

3. Bills of a bank, incorporated by a State, managed by directors under its charter, having a capital stock actually paid in and liable for its debts, and subject to be sued for non-payment, are not "bills of credit" issued by the State, though the State owns the entire stock, the legislature elects the directors, the faith of the State is pledged for the redemption of the bills, and they are made receivable in payment of all public dues. *Darrington v. State Bank of Alabama*, 13 H. 12....xix. 357.

4. Certificates, issued by the State of Missouri, in sums not exceeding ten dollars, nor less than fifty cents, receivable in payment of all state, county, and town dues, &c., the faith and funds of the State being pledged for their redemption, were held to be "bills of credit," the omission of which was prohibited by the constitution of the United States. *Craig v. Missouri*, 4 P. 410....ix. 116.

5. A promissory note given to the State in exchange for such certificates is void. *Ib.*

## CONSUL.

1. It is not competent for a neutral consul, without the special authority of his government, to interpose a claim on account of the violation of the territorial jurisdiction of his country. *The Anne*, 3 W. 435....iv. 253.

2. A vice-consul, duly recognized by our government, is a competent party to assert or defend the rights of property of individuals of his nation, in a court of admiralty. *The Bello Corrunes*, 6 W. 152....v. 44.

3. In the absence of specific powers from competent authority, he has no the right to receive, in his public character, the proceeds of property libelled. *Ib.*

CONFLICT OF LAWS, H. 5; EVIDENCE, H. 10.

## CONTEMPT.

CONSTITUTIONAL LAW, B.

## CONTRACT.

FOR LAWS IMPAIRING THEIR OBLIGATION, *see* CONSTITUTIONAL LAW, J.

A. MAKING A CONTRACT BY LETTERS, ACCEPTANCE OF OFFER AND OTHERWISE, 119.

B. CONSIDERATION, 120.

C. ILLEGAL, IMMORAL, OR AGAINST PUBLIC POLICY, 120.

D. CONSTRUCTION, AND HEREIN OF DEPENDENT AND INDEPENDENT STIPULATIONS, 122.

E. STATUTE OF FRAUDS, 123.

F. USURY, 124.

G. RESCISSION, 126.

H. MERGER, 126.

I. RIGHT OF ACTION ON, 126.

A. MAKING A CONTRACT BY LETTERS, ACCEPTANCE OF OFFER AND OTHERWISE.

1. An offer of a bargain, by one person to another, imposes no obligation upon the former, unless it is accepted by the latter, according to the terms on which the offer was made. *Eliason v. Henshaw*, 4 W. 225....iv. 382.

2. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the party who made it. *Ib.*

3. A offered to purchase of B two or three hundred barrels of flour, to be

delivered at Georgetown, District of Columbia, by the first water, and to pay for the same \$9.50 per barrel; and to the letter, containing this offer, required an answer by the return of the wagon by which the letter was sent. This wagon was at that time in the service of B, and employed by him in conveying flour from his mill to Harper's Ferry, near to which place A then was. His offer was accepted by B, in a letter sent by the first regular mail to Georgetown, and received by A at that place; but no answer was ever sent to Harper's Ferry. *Held*, that this acceptance, communicated at a place different from that indicated by A, imposed no obligation binding upon him. *Id.*

4. If a proposal is made by letter, which also states that the writer will empower A to act for him, and the person who receives the proposal applies to A, and makes known his acceptance, but A informs him he has received no instructions, and will not act, there is no complete agreement. *Barr v. Lapsley*, 1 W. 151....iii. 502.

5. An offer by underwriters to insure property on certain terms, sent to the owner by mail, cannot be revoked after it has been received by him and accepted by a letter deposited in the post-office the next day, and addressed to the underwriters. Such acceptance makes a complete contract to insure, which a court of equity will enforce by compelling the underwriter to pay the amount agreed to be insured. *Tayloe v. Merchant's Fire Insurance Company*, 9 H. 390....xviii. 191.

6. A correspondence held not to amount to a concluded agreement, but only to negotiation. *Head v. Providence Ins. Co.* 2 C. 127....i. 459.

7. An instrument, signed by a receiver of public moneys and his sureties, acknowledging themselves indebted to the United States in a sum of money, conditioned to be void on performance by the officer, of the duties of his office, the appointment to which it recites, but having no seals, though not a bond, is a binding simple contract, good at common law, and not made void by any act of congress. *United States v. Linn*, 15 P. 290....xiv. 93.

8. Where the plaintiff was serving as a clerk for a fixed annual salary, and wrote a letter to his employer, giving notice that after a certain time he should not serve without increased pay, and the employer replied he should pay no more, continuance in the service will not warrant him in finding an implied contract to pay more. *Nutt v. Minor*, 14 H. 464....xx. 287.

9. A bill of parcels is not the contract of sale, and it is open to explanation by extraneous evidence. *Harris v. Johnston*, 3 C. 311....i. 592.

## B. CONSIDERATION.

### ASSUMPSIT, B.

## C. ILLEGAL, IMMORAL, OR AGAINST PUBLIC POLICY.

1. No action lies on any contract, the consideration of which is either wicked in itself, or prohibited by law. *Armstrong v. Toler*, 11 W. 258...vi. 587; *Bank of the United States v. Owens*, 2 P. 527....viii. 198.

2. But if the illegal act is not the consideration of the contract, and is entirely disconnected from it, the contract is valid, though the occasion for

making the contract arose out of the existence of the illegal act. *Armstrong v. Toler*, 11 W. 258....vi. 587.

3. Thus, where A, during a war, contrived a plan for importing goods, on his own account, from the enemy's country, and goods were sent to B by the same vessel: A, at the request of B, became surety for the payment of the duties on B's goods, and became responsible for the expenses on a prosecution for the illegal importation of the goods, and was compelled to pay them: *Held*, that A might maintain an action on the promise of B to refund the money. *Ib*

4. But if the importation is the result of a scheme between the plaintiff and defendant, or if the plaintiff has any interest in the goods, or if they are consigned to him with his privity, in order that he may protect them for the owner, a promise to repay any advances made under such understanding or agreement, is utterly void. *Ib*.

5. Distinction between contracts tainted with illegality, and those collateral thereto and not affected by the taint. *McBlair v. Gibbes*, 17 H. 232....xxi. 473.

6. Though a collateral contract, made in aid of one tainted by illegality, cannot be enforced, yet a *bond fide* purchaser, for value of an illegal claim, who has received the proceeds thereof, cannot be compelled by the assignor's representatives or creditors, to account therefor; and if the claim was legalized before the proceeds were received, the assignee may rely on his assignment as valid. *Ib*.

7. A contract, not immoral, but in fraud of a war regulation existing when it was made, cannot be enforced, though made between enemies, and a mere stratagem of war. *Hannay v. Eve*, 3 C. 242....i. 568.

8. The plaintiffs being British subjects, and resident in England, during the war between the United States and Great Britain, received an order from the defendants' firm, under which they purchased goods for the defendant's firm, and advanced the price to the vendors. The goods were not received by the surviving partner of the firm until after the close of the war. *Held*, that an action for goods sold and delivered would not lie against the surviving partner, and that the contract was illegal. *Scholefield v. Eichelberger*, 7 P. 586....x. 581.

9. A contract by an inhabitant of Texas, to convey land in that country to citizens of the United States, in consideration of advances of money made by them in the State of Ohio, to enable him to raise men and procure arms to carry on the war with Mexico, the independence of Texas not having been at that time acknowledged by the United States, was contrary to our national obligations to Mexico, violated the public policy of the United States, and cannot be specifically enforced by a court of the United States. *Kennett v. Chambers*, 14 H. 38....xx. 24.

10. All contracts for a contingent compensation for obtaining legislation, or to use personal, or any secret, or sinister influence on legislators, are void. *Marshall v. Baltimore and Ohio Railroad Company*, 16 H. 314....xxi. 153.

11. Secrecy, as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use such secrecy, or voluntarily does use it, he cannot have the aid of a court to recover compensation. *Ib*.



12. What, in the technical language of politicians, is denominated "log rolling," is a misdemeanor at common law, punishable by indictment. *Ib.*

13. Where the defendant was employed by the plaintiffs to draw an illegal lottery, and fraudulently induced the plaintiffs to believe that a certain ticket had drawn a prize, and to pay the amount of such prize to one who held the ticket and received the money for the defendant. *Held*, that the illegality of the lottery was not a defence to an action for money had and received; and that, if the defendant was of age when he obtained the money, infancy was not a defence to the action. *Catts v. Phalen*, 2 H. 376....xv. 142.

14. A court of equity will not aid a judgment debtor to escape from payment of the judgment, upon the ground that the contract on which the action at law was founded, was prohibited by a statute. Both parties being in *pari delicto*, neither will be assisted. *Oreath's Administrator v. Sims*, 5 H. 192....xvi. 353.

#### D. CONSTRUCTION, AND HEREIN OF DEPENDENT AND INDEPENDENT STIPULATIONS.

##### COVENANT, C.

1. Where an agreement was made by the plaintiff to transport for the defendant certain stores, supposed to amount to about 3,700 barrels, and the plaintiff agreed to pay therefor \$1.50 per barrel,—*Held*, that the defendant did not bind himself to furnish any specific number of barrels. *Robinson v. Noble's Administrators*, 8 P. 181....xi. 63.

2. Where A agreed to ship sugars to B, for account of C, by such vessel as C might designate—*Held*, that C might empower B to designate the vessel. *D' Wolf v. Rabaud*, 1 P. 476....vii. 672.

3. To "liquidate" a debt, was held to include its payment. *Fleckner v. Bank of the United States*, 8 W. 338....v. 437.

4. Where, in a contract with the secretary of war for supplying the troops of the United States with provisions, specific prices are stipulated for rations issued at certain places mentioned in the contract; and it is further provided, that "should any rations be required at any places not specified in this contract, the price of the same shall be hereafter agreed on betwixt the public and the contractor;" if the parties cannot agree upon the price for the rations thus required, a reasonable compensation is to be allowed, and is to be proved by competent evidence, and settled by a jury; and the contractor, upon the trial, is at liberty to show that the sum allowed by the secretary of war is not a reasonable compensation. *United States v. Wilkins*, 6 W. 135....v. 38.

5. Where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other. *Goldborough v. Orr*, 8 W. 217....v. 390.

6. The contracts of vendor and vendee are construed to be dependent, unless a contrary intention plainly appears. *Bank of Columbia v. Hagner*, 1 P. 455....vii. 661.

7. If a purchaser of city lots stipulates to build, within a limited time, a

house on every third lot purchased, or in that proportion, and receives conveyances for the greater part of the lots, he is not bound to build in proportion to the lots conveyed, unless the whole number be conveyed. *Pratt v. Law*, 9 C. 456....iii. 428.

8. A letter of credit from E., addressed to A., in Havana, "in favor of R., to the amount of \$40,000, or \$50,000, which sum he may wish to invest through you in the produce of your island," was shown to B., and resulted in a contract between R. and B. for the latter to purchase coffee for account of R., for which B. was to be repaid by bills on New York at sixty days. This contract was made known to E., who assented to this use of his letter of credit: *Held*, that the stipulation for the mode of reimbursement by bills on New York, at sixty days, was a material part of the contract, and R. and B. having afterwards agreed to substitute, for bills on New York, bills on London, which were protested, E. was not bound. *Edmondston v. Drake*, 5 P. 624....ix. 498.

9. Under the law of Louisiana, a commutative contract, involving mutual and reciprocal obligations, to be performed at the same time, does not enable one party to put the other in default without an offer of performance of what is to be done by him, according to the contract. *Hyde v. Booraem*, 16 P. 169....xiv. 232.

10. He who has performed in part may require the other to pay to the extent of the benefit received, deducting damages suffered by the failure to perform fully, provided the contract is of such a nature as to be susceptible of being divided. *Ib.*

11. A contract to procure an extension of credit, upon all the debts payable by a merchant who had become insolvent, so as to enable him to resume and continue his business, is not thus divisible. *Ib.*

12. The modern doctrine, as to partial failure of consideration, and unliquidated damages suffered by the defendant, being shown by way of defence, examined. *Withers v. Greene*, 9 H. 213....xviii. 104.

13. In an action on a contract to build a dwelling-house, the defendant may show, in reduction of the stipulated price claimed, the amount of injury suffered by him, through any breaches of the contract by the plaintiff, though such damages are unliquidated; but he cannot defeat the action by proof that the plaintiff failed to complete the work by the time agreed on. *Van Buren v. Digges*, 11 H. 461....xviii. 683.

14. Mere acquiescence by the plaintiff in the defendant's doing certain things to the house, which caused delay beyond the stipulated time for the completion of the house, does not amount to a breach of that stipulation by the plaintiff. *Ib.*

ASSUMPSIT, B. 2; *Infra*, G. 2, 3.

## E. STATUTE OF FRAUDS. (GUARANTEE; SALES, C.)

A promise to answer for the duty of another must be wholly in writing, and cannot be varied, explained, or added to, by parol evidence. *Clarke v. Russell*, 3 D. 415....i. 295.

●

F. USURY. (CONFLICT OF LAWS, J.)

1. To constitute usury, there must be an intention, knowingly to contract for, or take usurious interest. If the contract, on its face, stipulates for it, there is no further inquiry; otherwise the inquiry is whether there was some agreement, device, or shift *dehors* the written contract to cover usury. *Bank of the United States v. Waggener*, 9 P. 378....xi. 395.

2. The mere fact that the note was given for an equal amount of bank-notes, whose market value was depreciated, does not amount to usury. *Ib.*

3. The statute against usury not only forbids the direct taking of more than six per cent., but any shift or devise, by which a greater rate may be, in fact, secured. *Scott v. Lloyd*, 9 P. 418....xi. 408.

4. Though a *bonâ fide* purchase of an annuity or rent charge, at a profit of more than six per cent., is not usurious, yet if the transaction be, in fact, a loan, and the form is resorted to as a device to give it a different appearance, it is void; and these facts are to be submitted to the jury. *Ib.*

5. A *bonâ fide* purchase of an annuity, even if the vendor has the option to repurchase at a certain sum, and though the effect be to give to the purchaser a greater rate of compensation for his money than the rate of interest allowed by law, is not usurious, unless it is a mere device to recover a usurious loan; this is a question of intent *dehors* the papers. *Lloyd v. Scott*, 4 P. 205....ix. 54.

6. Banks are within the usury laws; but discounting interest for the whole time of the loan from its amount is not usury. *Thornton v. Bank of Washington*, 3 P. 36....viii. 273. *Fleckner v. Bank of the United States*, 8 W. 338....v. 437.

7. If a bank engage to discount a note, and receive<sup>d</sup> the note and allow the maker to draw checks against the proceeds of the discount, it is not usury to treat the loan as made on the day when the note was received, although the proceeds of the discount were not placed to the credit of the maker on the books of the banks until a subsequent day, because the maker did not furnish to the bank till then, certain collateral security for the loan, which he had agreed to give. *Walker v. Bank of Washington*, 3 H. 62....xv. 289.

8. It is not inferable, from the fact that a note was renewed the day before it became payable, that the transaction was usurious. *Thornton v. Bank of Washington*, 3 P. 36....viii. 273.

9. Some contract to deprive the borrower of some part of his time must appear. *Ib.*

10. Any loss imposed on the borrower, in addition to the amount lent and lawful interest, is a violation of a law restricting the lender to a specified rate of interest. If a bank be forbidden to "take" more than six per centum, a contract reserving more is void, though not so declared in terms. *Bank of the United States v. Owens*, 2 P. 527....viii. 198.

11. If an agent, who has, by permission of his principal, sold eight per cent. stock, applies the money to his own use, and being pressed for payment gives a mortgage to secure the repayment of the amount of the stock with eight per cent. interest thereon, it is usury. *De Butts v. Bacon*, 6 C. 252....ii. 391.

12. The addition of the current rate of exchange to the legal rate of interest

is not usury, because the former is taken, not for the loan or forbearance of the money, but as a compensation for receiving it at a place where it is expected to be less valuable than at the place where the loan is made. *Buckingham v. McLean*, 13 H. 150 . . . . xix. 440.

13. If a charge for exchange is a cover for usury, the contract is usurious. *Andrews v. Pond*, 13 P. 65 . . . . xiii. 42.

14. There is no rule of law fixing the rate which may be charged for exchange, and a direction that the creditor could only charge what it would cost to transport specie, is erroneous. *Ib.*

15. The market price of good bills is the standard, to be applied by the jury. *Ib.*

16. Though, when third persons buy bills, they may pay less, on account of the doubtful credit of the drawee, a creditor, who takes a bill from his debtor, payable in another place, cannot add to the market rate of good bills any thing but lawful interest, as a compensation for the extension of the credit. *Ib.*

17. The defendant having received a bond of the plaintiff's intestate, without consideration, and sold it, covenanted with the deceased to save her harmless therefrom ; and in an action on that covenant, in which the declaration alleged payment of the bond by the plaintiffs, as a breach of the covenant, the defendant set up usury in the transaction ; *Held*, 1. That if the sale of the bond was *bonâ fide*, though at a greater rate of discount than legal interest, there was no usury ; *aliter*, if this form was resorted to as a cover for taking more than legal interest on a loan. 2. That if usury existed without the knowledge of the maker of the bond, or of the plaintiffs, it was not a defence, unless the plaintiffs had notice of it before they paid the bond, and were informed that the defendant wished to contest the payment on that ground. *Moncure v. Dermott*, 13 P. 345 . . . . xiii. 186.

18. If a note valid in its inception, and on which the payee could have an action against the maker, be sold by the indorser at a greater rate of discount than 6 per cent. per annum, the indorsee may maintain an action against the indorser ; whether he can recover more than the consideration paid was not decided. *Nichols v. Fearson*, 7 P. 103 . . . . x. 410.

19. If a valid promissory note of a third person be indorsed to secure collaterally, an usurious loan, no action can be sustained upon it by the indorsee against the maker, even if the usurious loan has been paid. *Gaither v. Farmers and Mechanics' Bank of Georgetown*, 1 P. 37 . . . . vii. 441.

20. The assignee of an equity of redemption cannot allege usury in the loan to the mortgagor to defeat a foreclosure by the mortgagee. *De Wolf v. Johnson*, 10 W. 367 . . . . vi. 438.

21. A new security, given to the lender, for the same usurious loan, is void. *Walker v. Bank of Washington*, 3 H. 62 . . . . xv. 289.

22. Though a past usurious contract be the basis on which the parties deal, yet if that contract be not void, a subsequent agreement, which frees the transaction from all usurious taint, is valid. *De Wolf v. Johnson*, 10 W. 367 . . . . vi. 438.

23. If a written instrument exhibits an usurious contract, it is for the court to construe it. *Levy v. Gadsby*, 3 C. 180 . . . . i. 553. *Walker v. Bank of Washington*, 3 H. 62 . . . . xv. 289.

24. And the jury are not at liberty to infer extraneous facts which would remove the taint of usury. *Levy v. Gadsby*, 3 C. 180....i. 553.

25. The statute of usury of Virginia does not, by its 3d section, enable the borrower to sustain a suit in equity without an averment that he is unable to prove the facts, sought by the bill, from the conscience of the defendant, by other testimony. *Brown v. Swann*, 10 P. 497....xii. 209. *Stanley v. Gadsby*, 10 P. 521....xii. 227.

26. Such a bill, if the defendant denies the usury, should be dismissed. *Ib.*

27. If a usurious loan, by way of an annuity, with a right of repurchase, is charged on real property as a rent, and distress is made for arrears after the premises have been sold, the purchaser may set up the usury, and thus invalidate the distress. *Lloyd v. Scott*, 4 P. 205....ix. 54.

#### G. RESCISSION. (EQUITY, B. b. 1; VENDOR AND PURCHASER, A.)

1. Though the vendee took possession, if the vendor does not offer to perform, on the day, the vendee may relinquish the possession, and treat the contract as rescinded. *Bank of Columbia v. Hagner*, 1 P. 455....vii. 661.

2. Under a power reserved to a party to declare a contract no longer binding, *held*, this extended only to the work which remained to be done, and did not deprive the contractor of compensation for what had been done. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 13 H. 307....xix. 512.

3. Certain special covenants and stipulations in an indenture between a railroad corporation and a contractor for building the road, construed and applied. *Ib.*

4. A contract to exchange securities, followed by an actual exchange, cannot be rescinded by one party without a tender of what he received. *Farmers' Bank of Virginia v. Groves*, 12 H. 51....xix. 25.

#### H. MERGER.

1. A simple contract is not merged in a sealed instrument, which merely recognizes the debt, and fixes the mode of ascertaining its amount. *Bank of Columbia v. Patterson's Administrator*, 7 C. 299....ii. 540.

2. The recital of a prior, in a later agreement, after it has been executed, does not extinguish the former. *Ib.*

#### I. RIGHT OF ACTION ON.

1. To sustain an action at law against the vendee for not accepting the property, the vendor must aver and prove his readiness and offer to perform on the day fixed by the contract for performance. *Bank of Columbia v. Hagner*, 1 P. 455....vii. 661.

2. A contract to use a patented machine during the continuance of the patent, and to pay therefor a fixed proportion of the value of fuel saved thereby, will not support an action until the expiration of the patent. *Washington, &c. Steam Packet Co. v. Sickles*, 10 H. 419....xviii. 440.

3. A special contract and also a *quantum meruit* being declared on, it is competent for the defendant to show that the only contract made was special, that it differed essentially from that declared on, and is still unexecuted; such evidence, if believed, defeats the action on both counts. *Ib.*

*Supra*, D. 5-14.

## CONTRIBUTION.

### MARSHALLING ASSETS.

Where a father purchased land, and suffered a judgment for the purchase-money which operated as a lien on his real and personal estate, and then died, and his son, who was his sole heir and distributee, executed a mortgage to secure the debt upon the personal and real estate, and died, and one set of claimants inherited his lands, and another were entitled to his personalty, held that the mortgage debt must be borne *pro rata* by the realty and personalty. *M'Learn v. M'Lellan*, 10 P. 625 . . . . xii. 273.

## CONVERSION.

### ALIEN, C.

1. When land is directed to be sold and turned into money, courts of equity, in dealing with the subject, consider it personalty. *Peter v. Beverly*, 10 P 532 . . . . xii. 234.

2. A devise of land to trustees, in trust to sell the same and pay the whole proceeds to an alien *cestui que trust*, is, in equity, a bequest of personalty; and the alien may take and hold the proceeds, and can compel the execution of the trust, even as against the State. *Craig v. Leslie*, 3 W. 563 . . . . iv. 294.

## COPYRIGHT.

1. In the United States, an author has no exclusive property in a published work except under some act of congress. Under the act of May 31, 1790, (1 Stats. at Large, 124,) an author obtains no such exclusive right, unless he complies with the requirements of the 3d and 4th sections of the act, by giving public notice in the newspapers, and depositing a copy of the work in the department of state. *Wheaton v. Peters*, 8 P. 591 . . . . xi. 223.

2. The reporter of this court can have no copyright in the written opinions delivered by the court. *Ib.*

3. Under the 6th section of the copyright law of February 3, 1831, (4 Stats. at Large, 437, the penalty can be adjudged only for the sheets found in the possession of the defendant. *Backus v. Gould*, 7 H. 798 . . . . xvii. 414.

4. The sale of a copperplate for a map, on an execution against the owner of the copyright of the map, does not pass to the purchaser a right to use the copperplate to print such maps. *Stephens v. Cady*, 14 H. 528 . . . . xx. 318; *Stevens v. Gladding*, 17 H. 447 . . . . xxi. 604.

## CORPORATIONS.

BANK OF THE UNITED STATES ; BANKS ; CONFLICT OF LAWS, F ; CONSTITUTIONAL LAW, J.

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## A. PUBLIC CORPORATIONS.

Though a city council, when acting in its legislative capacity, acts by ordinance, they may license a ferry by contract in writing, signed by the mayor. *Fanning v. Gregoire*, 16 H. 524....xxi. 284.

## B. PRIVATE CORPORATIONS.

1. A corporation for religious and charitable purposes, which is endowed solely by private benefactions, is a private eleemosynary corporation, although it is created by a charter from the government. *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, 8 W. 464....v. 483.

2. That a corporation is established for purposes of general charity, or for education generally, does not, *per se*, make it a public corporation, liable to the control of the legislature. *Trustees of Dartmouth College v. Woodward*, 4 W. 518....iv. 463.

3. Under its charter, Dartmouth College was a private and not a public corporation. *Ib.*

4. The act of March 26, 1804, § 5, (2 Stats. at Large, 279,) provided that an entire township in the Vincennes land district, in the Indiana territory, be



reserved from sale, and located by the secretary of the treasury, for the use of a seminary of learning. The secretary made the selection, October 10, 1806. The territorial legislature incorporated "The Trustees for the Vincennes University," November 29, 1806, and granted them additional powers, September 17, 1807, for the purpose, among others, of holding these lands and administering the use to which they had been dedicated by congress. *Held*, 1. That the territorial legislature had power to create this corporation. 2. That the constitution of the State did not impair, but expressly saved all its rights and powers. 3. That though its franchises could not be actually exercised, while there was no board of trustees, the corporation was not dissolved, and its powers to act were restored by a law under which a board was duly reorganized. 4. That this corporation took this land when created for that purpose. 5. That it was not a public corporation; and the legislature of the State could not divest its title to this land, and confer it upon another body politic. *Trustees for Vincennes University v. Indiana*, 14 H. 268....xx. 172.

5. An act of incorporation for private purposes does not bind any party affected by it, unless he accepts or assents to it; and declaring it to be a public act, does not dispense with this requirement. *Beatty v. Knowler's Lessee*, 4 P. 152....ix. 36.

6. This assent may be inferred from acts, as taking benefits under the law. *Ib.*

### C. CORPORATIONS SOLE AND AGGREGATE.

CHURCH, 3, 4, 7, 8.

### D. POWERS, FRANCHISES, AND LIABILITIES OF CORPORATIONS.

#### 1. CONSTRUCTION OF CHARTER AND EXTENT OF POWERS.

1. The rules of construction of public grants of franchises explained and applied. *Charles River Bridge v. Warren Bridge*, 11 P. 420....xii. 496.

2. A ferry existed by law, and its profits belonged to Harvard College; the State created a corporation, empowered it to build a bridge at the site of the ferry, and to take tolls; it was required to pay, and did pay, to the college an annual compensation for the tolls of which the latter might have received from the ferry. *Held*, that the ferry right, and all franchises connected therewith, were extinguished, not transferred to the bridge corporation. *Ib.*

3. Construction of the 13th section of the charter granted to the Potomac Company by Maryland and Virginia in 1784. *Binney v. Chesapeake and Ohio Canal Company*, 8 P. 201....xi. 67.

4. Under a stipulation in the charter of a railroad corporation, that the State would not, within thirty years, allow any other railroad to be constructed, within certain limits, the probable effect of which would be to diminish the number of a certain description of passengers on the railroad then chartered. *Held*, 1. That this stipulation was to be construed strictly, as against the corporation. 2. That it was not violated merely by chartering another railroad, which might be used, exclusively, to transport merchandise. *Richmond, Fredericksburg, and Potomac Railroad Company v. Louisa Railroad Company*, 13 H. 71....xix. 392.

5. If the charter of a corporation set apart a fund as capital, out of which debts are to be paid, it amounts to a contract with those who become creditors on the faith of it, that the fund shall not be withdrawn and appropriated to the use of the owner or owners of the capital stock. *Curran v. Arkansas*, 15 H. 304....xx. 524.

6. The act of incorporation of the Bank of Columbia, in the State of Maryland, though it enabled the bank to have an execution without a judgment, did not deprive the defendant of any defence on the return of the execution; among other things he may plead the statute of limitations; and the issuing of the execution is equivalent to the commencement of the action, under that plea. *Bank of Columbia v. Sweeney*, 2 P. 671....viii. 249.

7. A charter is to be fairly examined, and reasonably and justly expounded, and is not to receive a strained interpretation; but when thus examined, if its terms fairly admit of doubt, as to whether a power, burdensome to the public, has been granted, it cannot be exercised. *Perrine v. Chesapeake and Delaware Canal Company*, 9 H. 172....xviii. 82.

8. Words intended to limit the powers of the corporation cannot be construed to describe, and so to limit, the rights of the public. *Ib.*

9. A corporation can exercise no powers except those expressly conferred upon it, or which are incident to its existence; and, therefore, a canal corporation, not having been empowered by its charter to demand tolls on passengers, or on vessels by reason of their passengers, cannot lawfully exact such tolls. *Ib.*

10. The charter of such a corporation having provided for the payment of a certain toll by vessels not having merchandise on board, it was held that such vessels could not be excluded from the canal because they carried passengers. *Ib.*

11. A power to tax lands of the corporators must be found clearly granted by the charter, otherwise it does not exist. *Beaty v. Knowler's Lessee*, 4 P. 152....ix. 36.

12. A recognition in a charter, of the capacity of a body to take and hold lands by a particular name, confers the power, if it did not before exist. *Society for the Propagation of the Gospel, &c. v. Pawlet*, 4 P. 480....ix. 160.

13. The clause in the charter of Washington, that the city shall have power "to authorize the drawing of lotteries," &c., confers a power to be exercised, by drawing the lotteries on account, and at the risk, of the city, which is bound to the holder of a ticket to pay the prize it drew. *Olark v. Corporation of Washington*, 12 W. 40....vii. 19.

14. The power given to the corporation of Georgetown, by the act of Maryland, of November, 1797, c. 56, to graduate the streets of that city, is a continuing power, and the corporation may from time to time alter the graduation so made. *Goszler v. Corporation of Georgetown*, 6 W. 593....v. 181.

15. The power to grant licenses to auctioneers and to take bonds for the performance of their duty, given by the act of Virginia, of 1796, to the mayor, aldermen, and commonalty, and by the ordinance of 1800, transferred to the mayor and commonalty, has not been vested in the common council of Alexandria. *Fowle v. Common Council of Alexandria*, 3 P. 398....viii. 460.

16. The injury alleged in the declaration being an omission to take a bond

required by law, and the council not being enabled, or required to take it, the action cannot lie. *Ib.*

17. An auctioneer is not an agent of the town, and the town is not responsible for his misconduct. *Ib.*

18. Nor is it responsible because the council has misconstrued its powers and granted a license without authority. *Ib.*

#### CONSTITUTIONAL LAW, J. 24.

### 2. HOW AND WHERE POWERS EXERTED.

#### CONFLICT OF LAWS, F.; *Supra*, D. 1.

1. A corporation can exert its powers only in the manner authorized by its charter; and where that declared that instrument signed by the president, or an officer authorized by the by-laws, or the directors, should bind the company, it was held that such a signature was necessary. *Head v. Providence Insurance Company*, 2 C. 127....i. 459.

2. The 17th section of the act incorporating the Mechanics' Bank of Alexandria, providing that "all bills, bonds, notes, and every other contract or engagement on behalf of the corporation, shall be signed by the president, and countersigned by the cashier; and the funds of the corporation shall, in no case, be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid," does not extend to contracts and undertakings implied in law. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 W. 326....iv. 648.

#### BANKS, 7, 8.

### 3. LIABILITIES AND OTHER MATTERS. (*Supra*, D. 1.)

1. A legislative corporation, established as a part of the government of the country, is not liable for a mere non-feasance of its officers in omitting to take a bond before granting a license to an auctioneer. *Fowle v. Common Council of Alexandria*, 3 P. 398....viii. 460.

2. A railroad corporation, created by the State of Pennsylvania, and which built and owned a railroad within that State, is liable in an action for the use of a patented improvement on cars run on that road, though another corporation, created by the State of Maryland, held all its stock, provided the cars, and worked the road, charging to the Pennsylvania corporation the expense of doing so, and crediting it with the earnings on the road. *York and Maryland Line Railroad Company v. Winans*, 17 H. 30....xxi. 350.

3. If a provision in a charter or by-law be directory merely, a deviation from it cannot be taken advantage of by third persons. *Bank of the United States v. Dandridge*, 12 W. 64....vii. 29.

4. The power to establish a branch of the Bank of the United States in the State of Maryland, might properly be exercised by the bank itself. *McCulloch v. Maryland*, 4 W. 316....iv. 415.

5. A court of equity may restrain, by injunction, a public officer of a State, from acting under a void law of a State, to destroy a franchise. *Osborn v. Bank of the United States*, 9 W. 738....vi. 251.

6. As the State cannot be joined as a defendant, its agent may be sued alone. And if he has specific moneys and notes wrongfully taken, they may be ordered to be returned. *Ib.*

7. The ordinance of May, 1799, by which the corporation of Georgetown first exercised the power of graduating the streets, is not in the nature of a compact, and may be altered by the corporation. *Goszler v. Corporation of Georgetown*, 6 W. 593....v. 181.

8. The charter of the city of Washington did not authorize the corporation to force the sale of lottery tickets in States whose laws prohibited such sales. *Oohens v. Virginia*, 6 W. 264....v. 82.

9. The road stock contributed by the subscribers to the stock of the Union Bank of Alexandria, became the property of the bank. *Holbrook v. Union Bank of Alexandria*, 7 W. 553....v. 324.

#### E. DEEDS AND SIMPLE CONTRACTS OF CORPORATIONS.

*Supra*, D. 2.

1. Wherever a corporation aggregate is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action lies. *Bank of Columbia v. Patterson's Administrator*, 7 C. 299....ii. 540.

2. A banking corporation, created by the legislature of Louisiana, is capable of making a contract without the use of its corporate seal. *Fleckner v. Bank of the United States*, 8 W. 338....v. 437.

3. If the agents of a bank make a contract on its behalf, and set their own seals thereto, assumpsit lies against the bank. *Bank of the Metropolis v. Guttschlick*, 14 P. 19....xiii. 322.

4. The charter of a bank having empowered it to receive money on deposit, without requiring an obligation under seal to repay the amount deposited, the act of receiving a deposit creates a liability upon which an action of assumpsit lies, even in a State, where, in general, a corporation can contract only under its seal. *Bank of the Commonwealth of Kentucky v. Wister*, 2 P. 318....viii. 128.

BANKS, 13-18; PARTNERSHIP, A. 3.

#### F. OFFICERS AND AGENTS OF CORPORATIONS.

##### 1. APPOINTMENT, AND HEREIN OF DE FACTO OFFICERS AND AGENTS.

1. It is not necessary to produce evidence of the appointment of assessors of taxes of the city of Washington, if they have acted in that capacity, and their return has been sanctioned by the officers of the corporation. *Ronkendorf v. Taylor's Lessee*, 4 P. 349....ix. 93.

2. Upon the trial of an indictment for destroying a vessel with intent to defraud an incorporated insurance company, the act of incorporation being proved, it is only necessary to show that the company was *de facto* organized

and acting as a corporation, and that the usually acting officers of the company executed the policy; their authority to bind the company need not be otherwise proved. *United States v. Amedy*, 11 W. 392....vi. 638.

## 2. DUTIES AND POWERS. (EVIDENCE, I. 1.)

1. Powers of directors of a corporation are construed strictly. *Beaty v. Knowler's Lessee*, 4 P. 152....ix. 36.

2. The cashier of a bank is its executive officer, by whom its debts are received and paid, and its securities taken and transferred. *Fleckner v. Bank of the United States*, 8 W. 338....v. 437.

3. The acts of a cashier of a bank, done in the ordinary course of business of the bank, are *prima facie* evidence that they fell within the scope of his duties. *Ib.*

## AWARD, A. 2.

## G. RIGHTS AND LIABILITIES OF CORPORATORS, AND HEREIN OF TRANSFERS OF STOCK.

A provision in the charter of a corporation that transfers of its stock shall be made only on its books, is for the benefit of the corporation, and *bonâ fide* purchasers; third persons cannot take advantage thereof. It applies only to transfers of the legal, not of the equitable title. *Black v. Zacharie*, 3 H. 483....xv. 527.

## CONFLICT OF LAWS, F. 4; *Supra*, B. 5, 6.

## H. DISSOLUTION AND ITS CONSEQUENCES.

On the dissolution of a corporation, its effects are a trust fund for the payment of its creditors, who may follow them into the hands of any one, not a *bonâ fide* creditor, or purchaser without notice; and a state law, which deprives creditors of this right, and appropriates the property to other uses, impairs the obligation of their contracts, and is invalid. *Curran v. Arkansas*, 15 H. 304....xx. 524.

## CONSTITUTIONAL LAW, J. 40, 41; EQUITY, A. 21.

## COSTS.

### A. WHEN ALLOWED OR REFUSED, 133.

### B. WHAT INCLUDED, 134.

#### A. WHEN ALLOWED OR REFUSED.

1. If a judgment or decree is reversed, except for want of jurisdiction, the plaintiff in error or appellant recovers costs, in this court. *Bradstreet v. Potter*, 16 P. 317....xiv. 316.

2. In all cases where a cause is dismissed for want of jurisdiction, no costs are allowed. *M'Iver v. Wattles*, 9 W. 650....vi. 220.

3. And where a judgment is reversed for that cause, costs are not given. *Montalet v. Murray*, 4 C. 46....ii. 14.

4. But costs will be allowed upon a dismissal of a writ of error, for want of jurisdiction, if the original defendant be also defendant in error. *Winchester v. Jackson*, 3 C. 514....i. 654.

5. Where a judgment is entered up, and a blank left for the amount of costs, it is proper for the court, at a subsequent term, to have the costs taxed and the blank filled *nunc pro tunc*. *Sizer v. Many*, 16 H. 98....xxi. 41.

6. The court below, upon a mandate on reversal of its judgment, may award execution for the costs of the appellant in that court. *Riddle v. Mandeville*, 6 C. 86....ii. 327.

7. In all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court. *M'Knight v. Craig's Administrator*, 6 C. 183....ii. 359.

8. The United States are not liable for costs. *United States v. Boyd*, 5 H. 29....xvi. 290. *The Antelope*, 12 W. 546....vii. 347.

9. The fees and compensation to the marshal, for keeping, &c., captured Africans, where his fees or compensation are chargeable to the United States, are to be paid out of the treasury, upon a certificate of the amount, to be made by the court, or one of the judges. *The Antelope*, 12 W. 546....vii. 347.

JUDGMENT, &c. D. 2; UNITED STATES, B. 6.

## B. WHAT INCLUDED.

ADMIRALTY, F.; CAPTURE, H.

A judgment for costs includes all the costs belonging to the suit, whether prior or subsequent to the rendition of judgment. If new costs accrue, the judgment opens to receive them, and the costs of an original *ca. sa.* returned *non est* may be included in the *alias ca. sa.* *Peyton v. Brooke*, 3 C. 92....i. 535.

## COUNSEL FEES.

ADMIRALTY, E.

## COUNTERFEITING.

CONSTITUTIONAL LAW, A. 11; CRIMINAL LAW, B.

## COURTS MARTIAL.

CONSTITUTIONAL LAW, C. 4.

## COURTS OF THE UNITED STATES.

## JURISDICTION ; PRACTICE.

## A. THE SUPREME COURT, 135.

## B. COURTS INFERIOR TO THE SUPREME COURT, 135.

## a. CONSTITUTION AND ORGANIZATION OF SUCH COURTS.

## 1. GENERALLY.

## 2. CIRCUIT COURTS.

## 3. DISTRICT COURTS.

## 4. OTHER COURTS.

## b. POWER TO MAKE AND CONSTRUE RULES.

## c. POWER TO ISSUE EXECUTIONS.

## d. POWER TO ADJOURN.

## e. POWER TO ADOPT STATE LAWS.

## A. THE SUPREME COURT.

## JURISDICTION, A.; PRACTICE, I.

A justice of this court holding its August term under the 2d section of the act of April 29, 1802, (2 Stats. at Large, 156,) has not power to allow a rule to show cause why a writ of *mandamus* should not issue. *Ex parte Hennen*, 13 P. 225 . . . .xiii. 133.

## B. COURTS INFERIOR TO THE SUPREME COURT.

## JURISDICTION, B. to E.; PRACTICE, II.

## a. CONSTITUTION AND ORGANIZATION OF SUCH COURTS.

## 1. GENERALLY. (CONSTITUTIONAL LAW, D. 1.)

1. The courts of the United States are of limited jurisdiction ; but they are not technically inferior courts ; their judgments and decrees are binding until reversed, though no jurisdiction be shown on the record. *M' Cormick v. Sullivan*, 10 W. 192 . . . .vi. 377.

2. The court of appeals of the territory of Florida being a court of the United States, the State could exercise no control over them. *Hunt v. Palao*, 4 H. 589 . . . .xvi. 208.

CONSTITUTIONAL LAW, A. 5 ; LAWS OF THE SEVERAL STATES, B. 1.

## 2. CIRCUIT COURTS.

1. Judges of the supreme court may hold the circuit courts. *Contempora-*



neous construction of the constitution, and long practice and acquiescence have put this question at rest. *Stuart v. Laird*, 1 C. 299 . . . i. 414.

2. A circuit court may be holden by a district judge, though there is no judge of the supreme court assigned to that circuit. *Pollard v. Dwight*, 4 C. 421 . . . ii. 158.

3. The district judge cannot sit in the circuit court in a cause brought by writ of error from the district to the circuit court, and the cause cannot in such a case be brought from the circuit to this court upon a certificate of a division of opinion of the judges. *United States v. Lancaster*, 5 W. 434 . . . iv. 695.

4. Under the "Act to establish a uniform system of bankruptcy throughout the United States," (5 Stats. at Large, 440,) the district judge could not sit in the circuit court with the judge of the supreme court assigned to that circuit, on the hearing of questions certified into the circuit court, and a certificate of division of opinion cannot bring up such questions to this court. *Nelson v. Carland*, 1 H. 265 . . . xiv. 599.

5. Though the record shows the district judge was on the bench, if it also shows he did not sit in the cause, he was absent in contemplation of law. *Bingham v. Cabbot*, 3 D. 19 . . . i. 76.

6. The circuit court for the District of Columbia is a court of general criminal jurisdiction, and this court cannot revise its proceedings under an indictment and conviction of a prisoner, upon a writ of *habeas corpus*. Its judgment is conclusive that the imprisonment is legal. *Ex parte Watkins*, 3 P. 193 . . . viii. 370.

7. If a judge of the district or circuit court die, his successor has power to grant a new trial; if he refuses a new trial, from want of information as to the facts, he must sign the judgment, where the practice of the court requires his signature. *Life and Fire Insurance Company of New York v. Wilson's Heirs*, 8 P. 291 . . . xi. 106.

### 3. DISTRICT COURTS.

If a district court, having circuit court powers, render a judgment in a suit where district and circuit courts have concurrent jurisdiction, it must be taken to have acted under its powers as a district court, and not under its circuit court powers. *Southwick v. Postmaster-General*, 2 P. 442 . . . viii. 170.

### 4. OTHER COURTS.

1. Upon the admission of Florida into the Union, March 3, 1845, (5 Stats. at Large, 742,) the jurisdiction of the territorial courts, established by congress in that territory, ceased, and a decree, made by the district court of the territory, in a suit commenced March 24, 1846, was reversed for want of jurisdiction, and a mandate sent to the district court of the State, pursuant to the acts of February 22 and 23, 1847, (9 Stats. at Large, 128, 131.) *Benner v. Porter*, 9 H. 235 . . . xviii. 121.

2. A conviction under an indictment, found in the superior court of the territory of Florida in October, 1845, after that court ceased to have any jurisdiction, and transferred to the district court of the United States and there tried, is erroneous, and must be reversed. *Forsyth v. United States*, 9 H. 571 . . . xviii. 266.

3. The decision in the preceding case, *Forsyth v. United States*, 9 H. 571, affirmed. *Simpson v. United States*, 9 H. 578 . . . .xviii. 273.

4. The decision in the two cases next preceding, so far as respects the right to a writ of error, *Forsyth v. United States*, 9 H. 571, *Simpson v. United States*, 9 H. 273, affirmed. *Cotton v. United States*, 9 H. 579 . . . .xviii. 273.

CONFEDERATION, 1, 2, 3.

b. POWER TO MAKE AND CONSTRUE RULES.

1. A court may change its practice without written rules; and where the question is whether it has done so, its own solemn adjudication is the best evidence. *Duncan's Heirs v. United States*, 7 P. 435 . . . .x. 535.

2. And though written rules are preferable for the purpose of adopting a practice created by a state law, yet the circuit courts of the United States may do this without a written rule, and such adoption is sufficiently evidenced by the course and usage of the court. *Fullerton v. Bank of the United States*, 1 P. 604 . . . .vii. 723.

3. A court of the United States cannot, by a rule, adopt the provisions of a state law which is repugnant to, or incompatible with a positive enactment by congress. *Keary v. Farmers and Merchants' Bank of Memphis*, 16 P. 89 . . . .xiv. 195.

4. A rule of practice, adopting a state law, made by a district judge in the circuit court, will not be recognized in this court. *Amis v. Smith*, 16 P. 303 . . . .xiv. 311.

5. A statute of Mississippi, requiring a joint action against the drawer and indorsers of bills, and the makers and indorsers of notes, is repugnant to the 11th section of the judiciary act, (1 Stats. at Large, 78,) which enables the holder to sue his immediate indorser severally, if a citizen of another State, though the drawer is a citizen of the same State as the holder. *Keary v. Farmers and Merchants' Bank of Memphis*, 16 P. 89 . . . .xiv. 195.

6. There is nothing in the constitution or laws of the United States, to prevent the circuit court of the United States for Ohio, from adopting the act of that State concerning actions against drawers and indorsers. *Fullerton v. Bank of the United States*, 1 P. 604 . . . .vii. 723.

7. Under the act of May 8, 1792, § 2, (1 Stats. at Large, 276,) the courts of the United States may, by their rules, not only alter the forms, but the effect and operation of the process, whether mesne or final, and the modes of proceeding under it. *Beers v. Haughton*, 9 P. 329 . . . .xi. 376.

8. So of the process act of May 19, 1828, (4 Stats. at Large, 278.) *Ib.*

9. Though the rules made by this court, for the government of the practice of the circuit courts in equity, are undoubtedly binding on the latter, they were not intended to deprive them of power to give time to appear and answer in special cases. *Poultney v. City of LaFayette*, 12 P. 472 . . . .xii. 802.

10. If a circuit court misconstrue one of the rules made by this court for regulating the equity practice of circuit courts, and dismiss the bill, this court will, upon appeal, reverse the decree, and remand the cause for further proceedings. *Poultney v. City of LaFayette*, 3 H. 81 . . . .xv. 295.

11. A rule exempting the plaintiff in an action on a note, &c., from offering

evidence of its execution, unless the defendant should deny the signature by affidavit, is a proper rule, and the circuit courts have power to make it. *Mills v. Bank of the United States*, 11 W. 431....vi. 652.

12. If a party has made the proper preliminary proof to let in secondary evidence of a writing, it is not competent for the court, by a rule of practice, to exclude it. The rights of parties in matters of evidence, cannot be controlled by rules of court. *Patterson v. Winn*, 5 P. 233....ix. 311.

#### c. POWER TO ISSUE EXECUTIONS.

1. The 14th section of the judiciary act, (1 Stats. at Large, 81,) empowers the courts of the United States to issue executions. *Wayman v. Southard*, 10 W. 1....vi. 311.

2. The laws of the United States authorize the courts of the Union so to alter the form of the process of execution used in the supreme courts of the States in September, 1789, so as to subject to execution lands and other property, not thus subject by the state laws in force at that time, and such laws are constitutional. *Bank of the United States v. Halstead*, 10 W. 51....vi. 329.

*Supra*, B. b. 7, 8.

#### d. POWER TO ADJOURN.

The circuit court for the District of Columbia has authority to adjourn to a distant day, and the adjourned session is considered as the same term. *Mechanics' Bank of Alexandria v. Withers*, 6 W. 106....v. 24.

#### e. POWER TO ADOPT STATE LAWS.

1. The authority conferred on the courts of the United States by the act of May 19, 1828, (4 Stats. 278,) to alter final process, so as to conform it to any change which may be made in the laws of the States, does not empower the courts to adopt a state law in part, or with modifications; it must be adopted as enacted, if at all. *McCracken v. Hayward*, 2 H. 608....xv. 228.

2. Though a state law, providing for summary process against a sheriff, for the recovery of moneys levied by him, may be adopted by the circuit court as to the marshal, it cannot be applied to his sureties, consistently with the act of April 10, 1806, (2 Stats. at Large, 372.) *Gwin v. Barton*, 6 H. 7....xvi. 582.

*Supra*, B. b. 2-8.

## COVENANT.

### DAMAGES; ESTOPPEL.

#### A. THE ACTION OF COVENANT, 139.

1. THE DECLARATION AND HEREIN OF ASSIGNING BREACHES.
2. PLEADINGS.
3. GENERALLY.

B. COVENANTS FOR TITLE, 140.

C. CONSTRUCTION OF COVENANTS, 140.

D. LIABILITY OF COVENANTOR AND HIS REPRESENTATIVES, AND RIGHTS AND LIABILITIES OF AN ASSIGNEE, 140.

### A. THE ACTION OF COVENANT.

#### 1. THE DECLARATION, AND HEREIN OF ASSIGNING BREACHES.

1. It is not necessary, in an action of covenant on a sealed policy, to aver an abandonment in the declaration. *Hodgson v. Marine Insurance Company of Alexandria*, 5 C. 100 . . . .ii. 201.

2. In an action on a covenant of warranty of title, it is necessary to aver an eviction by title paramount; and an averment of "ouster by due course of law," amounts to such an averment. *Day v. Chism*, 10 W. 441 . . . .vi. 472.

3. It is not necessary that a breach should be assigned in the very words of a covenant; it is sufficient if a substantial breach is unequivocally shown. *Fletcher v. Peck*, 6 C. 87 . . . .ii. 328.

4. An averment, that by reason of an encumbrance the covenantee has been prevented from enjoying any part of the premises, is a sufficient assignment of a breach of a covenant against encumbrances. *Duval v. Craig*, 2 W. 45 . . . .iv. 20

#### 2. PLEADINGS.

1. In an action of covenant on a policy under seal, all special matter of defence must be pleaded. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 C. 206 . . . .ii. 373.

2. Under the plea of covenants performed, the defendant cannot give evidence which goes to vacate the policy. *Ib.*

3. To a declaration on a covenant in a charter-party, which assigned, as a special breach, non-payment of a particular sum, earned before a particular time, the defendant, after oyer had, pleaded payment of all sums which became due according to the charter-party. *Held*, that this plea tendered no issue, and that on the trial it could not be treated as confessing the count. *Simonton v. Winter*, 5 P. 141 . . . .ix. 256.

4. A plea of general performance, to an assignment of a special breach, is bad. *Ib.*

#### 3. GENERALLY.

1. Though two persons are named in an indenture, as "the party of the first part," if only one seals the deed, he alone is that party, and may sue alone on covenants with "the party of the first part." *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 18 H. 307 . . . .xix. 512.

2. Rules as to construing covenants to be dependent or otherwise. *Ib.*

## B. COVENANTS FOR TITLE. (LEASES, &amp;c. C.)

1. A covenant of lawful seisin may be broken without an ouster. *Pollard v. Dwight*, 4 C. 421 . . . . ii. 158. *Le Roy v. Beard*, 8 H. 451 . . . . xvii. 654.
2. Such a covenant is not broken because the title of the grantor was under a patent voidable by the State, but not avoided. *Pollard v. Dwight*, 4 C. 421 . . . . ii. 158.
3. Parol evidence that there were prior claims on the land is not admissible. *Ib.*
4. A covenant to warrant against all persons claiming under the grantors, was held to be distinct from another covenant to warrant generally, and a stipulation annexed to the latter to make good a breach by other lands, was held inapplicable to the former. *Duval v. Craig*, 2 W. 45 . . . . iv. 20.
5. A covenant against encumbrances by the covenantors, includes several as well as joint encumbrances. *Ib.*

## C. CONSTRUCTION OF COVENANTS.

*Supra*, A. 8 ; PATENTS, &c. C. 8.

A covenant with several lessors, to keep the demised premises in repair, is joint, though the lease sets out the proportions in which the lessors own, and reserves the rent to them, severally, in those proportions. *Calvert v. Bradley*, 16 H. 580 . . . . xxi. 805.

## D. LIABILITY OF COVENANTOR AND HIS REPRESENTATIVES, AND RIGHTS AND LIABILITIES OF AN ASSIGNEE.

1. If a covenantor add after his name the words "as trustee, &c.," they do not affect his personal liability to the covenantee. *Duval v. Craig*, 2 W. 45 . . . . iv. 20.
2. The question, whether a mortgagee of a leasehold interest is liable, on the covenants in the lease, as an assignee, considered. *Calvert v. Bradley*, 16 H. 580 . . . . xxi. 805.

## CREDIT.

LETTER OF; CONTRACT, D.; FRAUD, D.; GUARANTEE.

## CREDITORS.

ASSIGNMENTS, &c.; FRAUDS AS TO CREDITORS.

## CRIMINAL LAW.

CRIMINAL PROCEDURE; FORGERY; LIMITATIONS, E.; PERJURY; PIRACY;  
REVOLT.

- A. CASTING AWAY VESSELS AND STEALING FROM WRECKS, 141.
- B. CRIMES CONCERNING MONEY OR CURRENCY, 141.
- C. OF STATE CRIMINAL LAWS ADOPTED BY CONGRESS, 141.
- D. CRIMES CONNECTED WITH THE POST-OFFICE DEPARTMENT OR ITS BUSINESS, 142.

## A. CASTING AWAY VESSELS AND STEALING FROM WRECKS.

1. Under the act of March 26, 1804, (2 Stats. at Large, 290,) it is not necessary that the policy should have been valid so that a recovery could be had thereon. The crime is complete if the vessel was destroyed with intent to prejudice an underwriter *de facto*. *United States v. Amedy*, 11 W. 392....vi. 638.

2. A corporation is a person within the meaning of this act. *Ib.*

3. The 9th section of the act of March 3, 1825, (4 Stats. at Large, 116,) punishes thefts of goods belonging to vessels in distress, though committed above high-water mark. *United States v. Coombs*, 12 P. 72....xii. 634.

4. Under the grant of power to regulate commerce, congress had power to pass this law. *Ib.*

## B. CRIMES CONCERNING MONEY OR CURRENCY.

1. Under the 20th section of the act of March 3, 1825, (4 Stats. at Large, 121,) an indictment cannot be sustained for counterfeiting a "head pistareen," it not being a part of a dollar, within the meaning of that act. *United States v. Gardner*, 10 P. 618....xii. 269.

2. Under the charter of the Bank of the United States, a person who attempts to utter as true a false bill, purporting to be of that bank, and to be signed by the president and cashier thereof, is liable to indictment, although the persons whose signatures are forged were not president and cashier of that bank. *United States v. Turner*, 7 P. 132....x. 427.

3. A draft drawn by the president of a branch of the Bank of the United States on the principal bank, is not a bill, within the clauses of its charter which provide for the offences concerning forged bills. *United States v. Brewster*, 7 P. 164....x. 440.

## CONSTITUTIONAL LAW, N. 2.

## C. OF STATE CRIMINAL LAWS ADOPTED BY CONGRESS.

The 3d section of the act of congress entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," passed March 3, 1825, (4 Stats. at Large, 115,) adopted only the laws of the several States in force at the time of its enactment. *United States v. Paul*, 6 P. 141....x. 68.

#### D. CRIMES CONNECTED WITH THE POST-OFFICE DEPARTMENT OR ITS BUSINESS.

1. A person being indicted under the 24th section of the act of March 3, 1825, (4 Stats. at Large, 109,) concerning the post-office department. *Held*, 1. That it was necessary to aver in the indictment that the offence of robbing the mail was committed. 2. That an allegation that the defendant "did procure, advise, and assist J. S. to secrete, embezzle, and destroy a letter, &c," amounted to an averment that the offence was committed by J. S. 3. That being an indictment for a misdemeanor, it was sufficient, in this case, to describe the offence in the words of the statute. *United States v. Mills*, 7 P. 138 . . . .x. 430.

2. Under the 22d and 45th section of the post-office act, of March 3, 1825, (4 Stats. at Large, 108, 114,) a treasury note is a promissory note. *United States v. Hardyman*, 13 P. 176 . . . .xiii. 112.

3. And on an indictment for buying, &c. under that section, the words of a note offered in evidence being, "with interest at the rate of one M per centum," held that parol evidence, showing that M meant mill, was admissible, and if proved, that it was a fatal variance to describe the note as bearing interest at the rate of one per centum. *Id.*

### CRIMINAL PROCEDURE.

#### WARRANT; JURISDICTION, B. b. 2, C. 3.

##### A. INDICTMENT, INFORMATION, AND PLEAS, 142.

##### B. PROCEEDINGS BEFORE TRIAL, AND HEREIN OF JOINT AND SEPARATE TRIALS, 143.

##### C. TRIAL, 143.

1. VENUE, AND HEREIN OF JURISDICTION.

2. JURY AND CHALLENGES.

3. PROCEEDINGS DURING TRIAL.

4. WITHDRAWING CASE FROM JURY.

5. VERDICT.

##### D. JUDGMENT AND SENTENCE, 144.

##### A. INDICTMENT, INFORMATION, AND PLEAS.

1. Each count in an indictment is a substantive charge; and if the finding of the jury conform to any one of the counts, which in itself will support the verdict, it is sufficient, and judgment may be given thereon. *United States v. Pirates*, 5 W. 184 . . . .iv. 604.

2. In an indictment for a piratical murder, (under the act of the 30th of April, 1790, § 8,) it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a



vessel belonging to citizens of the United States ; but it is sufficient to charge it as committed on board such a vessel, by a mariner sailing on board such a vessel. *Ib.*

3. Under the 2d section of the act of March 3, 1823, (3 Stats. at Large, 772,) an indictment need not charge that the alleged acts were done "feloniously"—the statute makes certain acts done with a certain fraudulent intent or purpose felony, and if the acts, and intent or purpose, described in the statute are charged, it is a conclusion of law therefrom that a felony was committed. *United States v. Staats*, 8 H. 41 . . . . xvii. 492.

4. This section punishes not only the crime of forging certain instruments or uttering them when forged, but using a genuine, but false instrument, knowing it to be false, in support of a claim, with intent to defraud the government. *Ib.*

5. The language of the court in *Wood v. The United States*, 16 Pet. 342, which makes it necessary that the information for a forfeiture of goods on account of a fraudulent undervaluation should show that the fraudulent undervaluation was detected by an appraisement directed by the collector, is not correct, and such averments are not necessary. *Buckley v. United States*, 4 H. 251 . . . . xvi. 98.

6. An information for a forfeiture, on account of a fraudulent violation of the revenue laws, is in the nature of a criminal proceeding, and, if it contain one good count, that will support the judgment. *Olifton v. United States*, 4 H. 242 . . . . xvi. 89.

CRIMINAL LAW, D. 1, 3 ; PERJURY, 3 ; REVENUE LAWS, A. 2.

## B. PROCEEDINGS BEFORE TRIAL, AND HEREIN OF JOINT AND SEPARATE TRIALS.

### ARREST ; WARRANT.

Where two or more persons are jointly charged in the same indictment with a capital offence, they have not a right, by law, to be tried separately without the consent of the prosecutor ; but such separate trial is a matter to be allowed in the discretion of the court. *United States v. Marchant*, 12 W. 480 . . . . vii. 297.

## C. TRIAL.

FOR RULES OF EVIDENCE GENERALLY, *see* EVIDENCE ; *see also* PIRACY, REVOLT, AND OTHER CRIMES ; LAWS OF THE SEVERAL STATES, B. 6 ; REVENUE LAWS, F. 2.

### 1. VENUE, AND HEREIN OF JURISDICTION.

#### JURISDICTION, B. b. 2, F.

1. If an offence be committed on land, the offender must be tried by the court having jurisdiction over that territory where the offence was committed. *Ex parte Bollman ; Ex parte Swartwout*, 4 C. 75 . . . . ii. 23.

2. The sixth amendment of the constitution, respecting the place of trial, applies only to crimes committed in a State. *United States v. Dawson*, 15 H. 467 . . . .xx. 598.

3. The act dividing the State of Arkansas into two districts, and assigning to the district court, held in the western district, the power to try certain offences committed in the Indian country, did not deprive the circuit court previously held for the whole of Arkansas, and subsequently for the eastern district, from trying an indictment, pending therein at the time of the passage of the act of division. *Ib.*

## 2. JURY AND CHALLENGES.

### JURY, B.

## 3. PROCEEDINGS DURING TRIAL.

### PRACTICE, II. G.

## 4. WITHDRAWING CASE FROM JURY.

The court may discharge a jury from giving a verdict in a capital case, without the consent of the prisoner, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of public justice would otherwise be defeated. *United States v. Perez*, 9 W. 579 . . . .vi. 194.

## 5. VERDICT.

### See THAT TITLE.

Upon an indictment for putting goods on board a carriage, with intent to transport them out of the United States, contrary to the act of January 9, 1809, (2 Stats. at Large, 506,) the punishment of which offence is a fine of four times the value of the goods, it is not necessary that the jury should find the value of the goods. *United States v. Tyler*, 7 C. 285 . . . .ii. 531.

## D. JUDGMENT AND SENTENCE.

### *Supra*, A. 1, 6.

## CROSS EXAMINATION.

### PRACTICE, II. G. 3.

## CUMBERLAND ROAD.

### COMPACTS OF STATES, 14-16.

## CURTESY.

HUSBAND AND WIFE, A.

## DAMAGES.

ADMIRALTY, E.; BILLS, &c. G. 5; CAPTURE, H.; COLLISION, B.; EQUITY, A.;  
PATENT, F. 3; PRACTICE, II. I.

1. When a judgment or decree is affirmed on a writ of error, there can be no allowance of damages, except for delay. *Cotton v. Wallace*, 3 D. 302....i. 231.

2. Eight per cent. per-annum allowed. *Ib.*

3. In an action by a vendee for not delivering an article sold, to be paid for on delivery, the measure of damages is the difference between the contract price and the price when the contract was broken. *Shepherd v. Hampton*, 3 W. 200....iv. 198.

4. The probable or possible profits of an unfinished voyage, afford no rule to estimate the damages in a case of marine trespass. *The Amiable Nancy*, 8 W. 546....iv. 287.

5. In cases of marine torts, the probable profits of a voyage are not a fit rule for the ascertainment of damages. *La Amistad de Rues*, 5 W. 385....iv. 673.

6. In an action at law by the vendee, against the vendor, for a breach of the contract, in not delivering the thing sold, the proper measure of damages is the price of the thing sold at the time of the breach. *Hopkins v. Lee*, 6 W. 109....v. 26.

7. This rule applies to the sale of real as well as personal property. *Ib.*

8. Where a consignee at Leghorn was instructed to purchase tiles to be shipped to Havana for sale, and wrongfully purchased another article, the measure of damages is the actual loss sustained by the consignor, in consequence of not having the tiles for sale at Havana. *Bell v. Cunningham*, 3 P. 69....viii. 289.

9. In an action for compensation for the hire of a steamboat, damages cannot be given for a time subsequent to the defendants' appearance in the action. *Bradley v. Washington, Alexandria, and Georgetown Steam Packet Company*, 9 P. 107....xi. 301.

10. A ministerial officer, acting in good faith, is liable for compensatory damages only. *Tracy v. Swartwout*, 10 P. 80....xii. 26.

11. If a postmaster-general wrongfully refuse to give a credit to a contractor, and if the latter should be entitled to his action for damages, he cannot recover special damages for detention of the money, beyond interest. *Kendall v. Stokes*, 3 H. 87....xv. 296.

12. The damages for a breach of orders to hold for sale till a particular day, and then sell, are the difference between the price on that day and the price obtained. *Brown v. Mc Gran*, 14 P. 479....xiii. 601.

13. A contractor on a public work, having underlet his contract to a subcontractor, with a stipulation that, if the latter failed to use due diligence, the

former might assume the direction, and complete it at the expense of the latter. *Held*, that a charge for superintendence, after assuming the work, could not be made against the sub-contractor. *Fresh v. Gilson*, 16 P. 327 . . . .xiv. 324.

14. In an action for breach of a contract to permit the plaintiff to construct a railroad and to pay him therefor, at certain rates, the profits, meaning thereby the difference between the cost to him of doing the work, and the price to be paid for it, are a proper subject of damages. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 13 H. 307 . . . .xix. 512.

15. In an action of trespass, a jury may give what are called exemplary damages; but counsel fees are not to be included in, and allowed as part of the damages, in any action at law. *Day v. Woodworth*, 13 H. 363 . . . .xix. 534.

16. If the defendant does not give up mortgaged property to the mortgagee pursuant to a decree to that effect, its value at the time of the failure to obey the decree, is the measure of damages. *Fowler v. Merrill*, 11 H. 375 . .xviii. 655.

17. The price paid for a license to use the thing patented, may properly be considered by the jury in estimating the damages for an infringement, but does not afford an absolute rule of damages. *Hogg v. Emerson*, 11 H. 587 . . . .xviii. 724.

18. Where the covenantee had been evicted from part of the land, it is erroneous to instruct the jury to allow a like part of the purchase-money, as damages in an action of covenant; the value of that part of the land lost, taking the consideration paid as the value of the whole, and adding interest from the time of the loss, and expenses, would be the measure of damages. *Griffin v. Reynolds*, 17 H. 609 . . . .xxi. 725.

CONTRACT, D. 12-14; ERROR, I. 13; PENALTIES AND FORFEITURES, A. 2, 3;  
TRESPASS, 1, 2.

## DEBT.

FOR DAMAGES IN, *see* THAT TITLE; FOR DECLARATION AND PLEADINGS IN ACTION ON BOND, *see* BOND, H.

A. DECLARATION, 146.

B. PLEAS, REPLICATIONS, &c. 147.

C. FOR WHAT IT LIES, AND WHEN IN THE DETINET ONLY, 147.

### A. DECLARATION.

1. In an action of debt, though no damages are claimed, in the count, the *ad damnum* in the writ is sufficient. *Childress v. Emory*, 8 W. 642 . . . .v. 530.

2. In an action of debt, the *ad damnum* is only to cover interest. *Huff v. Hutchinson*, 14 H. 586 . . . .xx. 354.

3. In an action of debt on a judgment recovered by the plaintiff as administrator, the plaintiff may declare personally and not in his representative

character, and is not bound to make profert of his letters of administration. *Biddle v. Wilkins*, 1 P. 686....vii. 770.

PLEADING, B. 13, 15–17.

### B. PLEAS, REPLICATIONS, &c.

1. *Nil debet* is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action. *Sneed v. Wister*, 8 W. 690....v. 543.

2. To an action of debt on a judgment recovered by the plaintiff as administrator, *ne unques administrator*, or any thing equivalent to it, is not a good plea in bar. *Biddle v. Wilkins*, 1 P. 686....vii. 770.

### C. FOR WHAT IT LIES, AND WHEN IN THE DETINET ONLY.

#### JUDGMENTS AND DECREES, F.

1. An action of debt will not lie in Maryland upon a promissory note. *Lindo v Gardner*, 1 C. 844....i. 422.

2. Under the laws of North Carolina, adopted by Tennessee, an action of debt by an indorsee, will lie on a promissory note, and such an action of debt was not barred by any statute of limitations of Tennessee. *Kirkman v. Hamilton*, 6 P. 20....x. 8.

3. An action at law will not lie in the circuit court of the United States for the District of Columbia, to recover a sum of money decreed to be paid by the same court sitting in equity. *Hugh v. Higgs*, 8 W. 697....v. 546.

4. An action of debt will lie by the payee or indorsee of a bill of exchange, against the acceptor, where it is expressed to be for value received. *Raborg v. Peyton*, 2 W. 385....iv. 144.

5. Debt, in the *detinet* only, is the proper form of action against an executor, if he has not made himself personally responsible by a *devastavit*. *Childress v. Emory*, 8 W. 642....v. 530.

6. And it is matter of form, which can be taken advantage of by special demurrer only. *Ib.*

7. Wager of law does not exist under the constitution of the United States, which provides for trial by jury, and an action of debt does lie against an executor. *Ib.*

## DEBTOR AND CREDITOR.

### ASSIGNMENT FOR BENEFIT OF CREDITORS; FRAUDS AS TO CREDITORS; INSOLVENCY; INSOLVENT LAWS.

1. By a private act of congress, certain moneys were directed to be paid to the representatives of a deceased custom-house officer, to which he had no legal claim. *Held*, that creditors were not entitled to the fund. *Emerson's Heirs v. Hall*, 13 P. 409....xiii. 221.

2. The legislatures of Maryland and Virginia having authorized a surrender of the charter of the Potomac Company, and the vesting of its property, &c., in the Chesapeake and Ohio Canal Company, on the condition, (among others,) that the latter would make certain payments to creditors named in the charter of the Canal Company. *Held*, that as the plaintiff was not named therein as a creditor, there was no contract with him, and he could not thus obtain payment. *Smith v. Chesapeake and Ohio Canal Company*, 14 P. 45 . . . . xiii. 336.

8. If a debtor indorse notes to his creditor as collateral security, the creditor does not make them his own by failing to give notice to the debtor on non-payment, according to the requirements of the commercial law ; it is merely a question of due diligence, on the part of the creditor, to obtain payment. *Lawrence v. Mc Calmont*, 2 H. 426 . . . . xv. 178.

PARTNERSHIP, C. 8.

## DEBTORS OF THE UNITED STATES.

BOND ; INSOLVENT LAWS, B. ; RECEIVERS OF PUBLIC MONEY ; SUBSTITUTION.

## DECLARATION.

EVIDENCE, E. 1 ; PLEADING, B.

## DECREES.

JUDGMENTS AND DECREES.

## DEDICATION.

CHARITY ; EQUITY, B. b. 1 ; PATENTS, C. 8.

1. A question in equity as to the title to a lot of land in the town of Lexington, Kentucky, reserved as public property, and claimed as having been appropriated by the plaintiff's ancestor. Bill dismissed under the circumstances of the case. *M'Connell v. Trustees of the Town of Lexington*, 12 W. 582 . . . . vii. 372.

2. If the owner of a tract of land dedicate it to the public use as an open square of a city, for the convenience and accommodation of the inhabitants, the public acquire a vested right to its possession for that use, and the owner or his representatives cannot maintain an action of ejectment to recover possession of it. *City of Cincinnati v. White's Lessee*, 6 P. 431 . . . . x. 179.

3. To constitute such a dedication the legal title need not pass from its owner, nor is it necessary that any grantee of the use should be in existence ; all that is required is the assent of the owner of the land to the use, and the

actual enjoyment of the use, for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. *Ib.*

4. Though land is not in a condition to be presently used as a street, and has never been so used; yet, if capable of being so used, it may have been dedicated. *Barclay v. Howell's Lessee*, 6 P. 498....x. 202.

5. Where a part of a strip of land adjoining a river had been used as a way, and the residue was not in a condition to be so used without grading, &c., and the public authorities had from time to time improved more and more of it, and the proprietors had made no claim for thirty years, and their agent declared, when the town was laid out, that it was reserved for a street. *Held*, that the jury would be warranted in finding a dedication of the whole strip, and if so dedicated the proprietor could not recover. *Ib.*

6. Though non-user is important evidence upon the question of dedication, it is not conclusive. *Ib.*

7. That land may be dedicated to the public use, without vesting the legal title in a corporate body, is settled. *New Orleans v. United States*, 10 P. 662....xii. 292.

8. Upon the facts of this case, it was held that there was such a dedication of certain lands in New Orleans, while Louisiana was held by France, and that it was recognized, and the uses continued, while that province was held by Spain. *Ib.*

9. Under the laws of France and Spain, though the crown had the power to regulate the public use of such places, it could not destroy it, save by an exercise of the right of eminent domain. *Ib.*

10. The erection of certain public buildings upon a public place, and even the unadvised grants in fee of portions of the land, held not to be strong evidence against the public right. *Ib.*

11. A dedication of land for a public highway cannot be presumed, where the land in question was part of a wharf, was kept open and used as a passageway to a warehouse on the wharf belonging to the owners of the land in question, and they used the land at their pleasure to pile merchandise thereon, and paid taxes therefor as on the residue of the wharf. *Irwin v. Dixion*, 9 H. 10....xviii. 6.

12. A dedication of land to a public use is made by an intent of the owner to dedicate it, sufficiently manifested by some act or declaration by him; and where such intent cannot be found, no declaration is made. *Ib.*

## DEED.

A. EXECUTION, DELIVERY, ALTERATION, AND THE FORMAL PARTS OF A DEED, AND HEREIN OF ESCROWS, 150.

B. PROOF, 151.

C. ACKNOWLEDGMENT AND PROOF FOR REGISTRATION, 151.

D. REGISTRATION AND ENROLMENT, AND WHEN DISPENSED WITH, 152.



E. CONSTRUCTION, 154.

F. CALLS AND BOUNDARIES, 154.

G. EXCEPTIONS AND RESERVATIONS, 155.

H. WHEN DEED NECESSARY, 155.

I. OPERATION AND EFFECT, AND HEREIN OF CANCELLATION, 155.

A. EXECUTION, DELIVERY, ALTERATION, AND THE FORMAL PARTS OF A DEED, AND HEREIN OF ESCROWS.

EVIDENCE, B. 2; JURY, A.

1. The laws of Ohio require all deeds of land to be executed in the presence of two witnesses, and a deed executed in the presence of one witness only is void. *Clark v. Graham*, 6 W. 577....v. 172.

2. Though it may be shown that, at the time of the sealing of an indenture, it was agreed that the instrument should not be the deed of a corporation until a condition should be complied with, such an understanding prior to the sealing, and in no way connected with that act, cannot be shown. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 13 H. 307....xix. 512.

3. The act of Maryland, requiring a deed of land to be acknowledged and recorded, does not apply to the instrument, but to the estate designed to be conveyed, and such an instrument is an executed deed from the time of its delivery. *Wood v. Owings*, 1 C. 239....i. 405.

4. A deed executed by an attorney in his own name, as attorney, does not convey land of the principal. *Clarke's Lessee v. Courtney*, 5 P. 319....ix. 366.

5. If a sealed instrument be executed by "J. L., agent for J. M.," J. L. is bound personally. *Lutz v. Linthicum*, 8 P. 165....xi. 58.

6. A deed, executed by a guardian, to convey the land of his ward, pursuant to a decree of a court of chancery, "W. M. D., guardian for M. B.," is sufficient. *Van Ness v. Bank of the United States*, 13 P. 17....xiii. 10.

7. Possession of a deed, by a party claiming under it, is *prima facie* evidence of its delivery. *Games v. Stiles*, 14 P. 322....xiii. 479.

8. An instrument of release, signed by a number of his creditors, was found in the possession of the debtor; this circumstance is not conclusive; it is an open question, whether it was agreed that it should not take effect unless all signed it, and that some had refused. *Dick v. Balch*, 8 P. 30....xi. 12.

9. A deed left with the county clerk to be recorded, and held by him for the grantee, is, in law, delivered to the grantee. *Tompkins v. Wheeler*, 16 P. 106....xiv. 202.

10. An erasure, or interlineation, apparent on the face of a deed, does not avoid it, unless shown to have been made fraudulently, or without the assent of those affected. *Speake v. United States*, 9 C. 28....iii. 242.

11. The impression of a seal upon paper, sufficiently clear to be recognized, is a valid legal seal. *Pillow v. Roberts*, 13 H. 472....xix. 597.

12. If a married woman sign, seal, and acknowledge a deed, in which there are no words of grant on her part, but only by her husband, who is also a party to the deed, it is, as to her, utterly void, and is not validated by her receipt of the consideration money after she became discovert. *Agricultural Bank of Mississippi v. Rice*, 4 H. 225 . . . .xvi. 87.

#### B. PROOF. (EVIDENCE, B. 2, H.; PRESUMPTIONS.)

1. The probate, of a deed by a witness before a magistrate, is entitled to more weight than mere evidence of the handwriting of a subscribing witness. *Crane v. Morris's Lessee*, 6 P. 598 . . . .x. 274.

2. In Maryland, an office copy of a recorded deed is evidence as competent as the original. *Dick v. Balch*, 8 P. 30 . . . .xi. 12.

3. Where an original deed, more than thirty years old, was lost, and the register swore he recorded an instrument which was attested by A. J., justice of the peace, whose handwriting he knew, and believed the signature to be the official signature of that person, and that the paper produced was a copy of that record.—*Held*, legal evidence of the due execution and of the contents of the original. *Winn v. Patterson*, 9 P. 663 . . . .xi. 516.

4. Under the law of Arkansas, a deed, made by a collector of taxes, and acknowledged and recorded, is evidence of the validity of the collector's proceedings. *Pillow v. Roberts*, 13 H. 472 . . . .xix. 597.

#### C. ACKNOWLEDGMENT AND PROOF FOR REGISTRATION.

1. A judge of the supreme court of Pennsylvania, is competent to take an acknowledgment of a deed of lands under the statute of 1715 of that State. *M'Keen v. De Lancey's Lessee*, 5 C. 22 . . . .ii. 181.

2. If the deed convey lands in two counties, recording it in one of them is sufficient under that statute. *Ib.*

3. A certificate of acknowledgment of a deed must show, with reasonable certainty, that the party did appear before the officer and acknowledge the deed. *Hinde's Lessee v. Longworth*, 11 W. 199 . . . .vi. 561.

4. The privy examination and acknowledgment of the deed of a *feme covert* cannot be proved by parol. *Elliott v. Piersol's Lessee*, 1 P. 328 . . . .vii. 601.

5. When the clerk has made a record of his certificate of such examination and acknowledgment, he is *functus officio*, and cannot afterwards amend the certificate. *Ib.*

6. There being nothing in the Maryland acts of assembly requiring justices of the peace to describe their official character in their certificates of the acknowledgment of deeds, extraneous evidence may be admitted to show that the person who made the certificate held that office, and he will be presumed to have acted in his official character. *Van Ness v. Bank of the United States*, 13 P. 17 . . . .xiii. 10.

7. The act of Virginia of 1776, entitled "An act to enable persons living in other countries to dispose of their estates in this commonwealth with more ease and convenience," adopted by Kentucky, stood unrepealed in March, 1811, in

Kentucky, so far as respects the mode of acknowledging a deed before a mayor or other chief magistrate of a city, &c. *Daviess v. Fairbairn*, 3 H. 636.... xv. 573.

8. The law of Alabama does not require the acknowledgment of a *feme covert* to be made *in ipsissimis verbis*; if it conform in substance to what the statute requires, it is valid. *Dundas v. Hitchcock*, 12 H. 256.... xix. 123.

9. Under the act of the State of Tennessee, of November 23, 1809, a deed, proved by one of the subscribing witnesses before a judge of a court of another State, where the grantor resided, and made the deed, and registered in the county where the land lay, was valid. *Blackwell v. Patton*, 7 C. 471.... ii. 626.

10. Questions as to the probate and registration of a deed, under the North Carolina act of 1715. *Ross v. M'Lung*, 6 P. 283.... x. 113.

*Supra*, A. 3.

#### D. REGISTRATION AND ENROLMENT, AND WHEN DISPENSED WITH.

FOR FOREIGN REGISTRATION, *see* CONFLICT OF LAWS, H.

1. The Virginia "act concerning conveyances," includes mortgages of personal property, and such a mortgage, admitted to record on the oaths of only two subscribing witnesses, is void as against a creditor who had notice of the mortgage. *Hodgson v. Butts*, 3 C. 140.... i. 547.

2. The law of Georgia only requiring a deed to be recorded within twelve months from its date, subsequent purchasers cannot complain if the deed be recorded within that time. *Shirras v. Caig*, 7 C. 34.... ii. 447.

3. Under the law of Rhode Island, a mortgage of personal property, without possession by the mortgagee, is not valid, if not recorded, and the register is directed to record such mortgages in a book to be kept for that purpose. *Held*, that a mortgage embracing both real and personal property might be recorded in the book of records of real estate. *Anthony v. Butler*, 13 P. 423.... xiii. 230.

4. The certificate of the register of the fact of recording, and its time, is evidence thereof. *Id.*

5. Two acts of the State of Michigan, passed on the same day, respecting recording of conveyances, held not to be repugnant, and that a mortgage was rightly recorded in the county registry, though the land was in the city of Detroit, and one of these acts provided for registration in the city registry. *Beals v. Hale*, 4 H. 37.... xvi. 13.

6. A question under the registry acts of Tennessee, which of two conveyances was first duly registered. *Love v. Simm's Lessee*, 9 W. 515.... vi. 161.

7. Certain statutes of North Carolina and Tennessee, concerning the registering of deeds of land, construed. *Denn v. Reid*, 12 H. 256.... xii. 228.

8. Where a statute declared that all conveyances, not acknowledged and recorded, should be valid as between the parties and their heirs, but void as to all creditors and subsequent purchasers, it was held, that only creditors and

purchasers of the grantor, were intended ; and that creditors of the husband could not claim property of the wife, settled on her by an ante-nuptial deed, not recorded. *Pierce v. Turner*, 5 C. 154 . . . . ii. 216.

9. By the statutes of Ohio, an unrecorded deed is void as against one to whom the grantor was decreed by a court of chancery to make a title, such decree operating as a conveyance. *Steele's Lessee v. Spencer*, 1 P. 552 . . . . vii. 694.

10. In New Jersey, the omission to record a deed of real estate, avoids it only as against creditors and purchasers of the grantor. *Magniac v. Thompson*, 7 P. 348 . . . . x. 518.

11. In Kentucky, a deed not acknowledged or recorded, passes the title as against all the world except creditors of the grantor, and purchasers from him without notice. *Sicard's Lessee v. Davis. Same v. Cecil*, 6 P. 124 . . . . x. 59.

12. In Maryland, a deed not enrolled, is a nullity ; and conveyances by an insolvent to his assignee are not an exception to the general rule. *Greenleaf's Lessee v. Birth*, 6 P. 302 . . . . x. 126.

13. In Louisiana, a notarial act concerning immovable property, has no effect on the rights of third persons, until recorded in the proper office. *McCoy v. Rhodes*, 11 H. 181 . . . . xviii. 575.

14. If a law requires mortgages to be recorded, and a mortgage had already been recorded prior to the passage of the law, this is sufficient. *Fowler v. Merrill*, 11 H. 375 . . . . xviii. 655.

15. Open and notorious adverse possession is evidence of notice of the title under which the possession is held, so as to give validity to an unrecorded deed. *Landes v. Brant*, 10 H. 348 . . . . xviii. 418.

16. An ante-nuptial contract is good, *inter partes*, from the time of its execution, without recording, under the law of South Carolina ; and if recorded after the expiration of three months, such record is constructive notice to creditors and purchasers from the time it was made. *De Lane v. Moore*, 14 H. 253 . . . . xx. 163.

17. The admission of a deed to be registered, does not preclude an examination into the evidence upon which it was admitted ; and if found not to conform to the requisitions of law the registration is void. *Blackwell v. Patton*, 7 C. 471 . . . . ii. 626.

18. A deed of land to a *bond fide* purchaser, acknowledged and recorded before, but executed and delivered after, another deed of the same land, operates to convey the land to the second purchaser. *Brown v. Jackson*, 3 W. 449 . . . . iv. 257.

19. But as the earliest deed was operative between the parties, if the second deed purports to convey only the right, title, and interest which the grantor had at the time of its execution, it does not convey any thing to the grantee. *Ib.*

20. Where a county in Ohio was divided, a deed of land, lying in the new county, was not rightly recorded in the registry of the old county after such division, though executed before such division. *Astor v. Wells*, 4 W. 466 . . . . iv. 446.

21. Though a deed is required by law to be recorded, the original alone can

be used in evidence, unless it appears not to be under the control of the party. *Brooks v. Marburg*, 11 W. 78....vi. 517.

*Supra*, A. 3.

### E. CONSTRUCTION.

1. Where a grantor was under obligation to set apart and convey to each of thirty settlers on a township, a lot of one hundred acres, and conveyed, by a description which covered a part of the township, "subject, however, to the condition that the said Mallett, the grantee, shall perform his part of the settling duties in proportion to the land conveyed;" and afterwards the grantee mortgaged, "the same this day conveyed to me by N. I. as by his deed, reference thereto being had;" and subsequently the grantee proceeded to perform his part of the settling duties, and conveyed the necessary lots to the settlers. *Held*, that the lots thus conveyed to the settlers were not subject to the mortgage. *Foxcroft v. Mallett*, 4 H. 358....xvi. 143.

2. Construction of a grant of water of a spring. *Irwin v. United States*, 16 H. 518....xxi. 281.

3. The practical construction put on the grant by the grantees, continued through sixteen years, held to be evidence of what was intended to be conveyed. *Ib.*

4. A conveyance of a naked legal title to the equitable owners of the land, under no other description of the grantees than "the legatees and devisees of the late A. B.," passes the title to the persons named in the will of A. B. as his legatees and devisees. *Webb v. Den*, 17 H. 576....xxi. 694.

5. A grant of a tract of land, in equal shares, to sixty-three persons, to be divided amongst them into sixty-eight equal shares, with a specific appropriation of five shares, conveys only a sixty-eighth part to each person. If one of the shares be declared to be "for a glebe for the Church of England, as by law established," that share is not holden in trust by the grantees, nor is it a condition annexed to their rights or shares. *Town of Pawlet v. Clark*, 9 C. 292....iii. 358.

6. Construction of a deed of trust for the benefit of creditors, *held* to have provided only for individual, to the exclusion of partnership creditors. *Murrill v. Neill*, 8 H. 414....xvii. 641.

*Infra*, F. 4.

### F. CALLS AND BOUNDARIES.

BOUNDARY; EVIDENCE, F.; PUBLIC LANDS OF STATES, A.; PUBLIC LANDS OF THE UNITED STATES, III. D. d. 5.

1. It is a universal rule that course and distance yield to natural and ascertained objects. *Preston's Heirs v. Bowmar*, 6 W. 580....v. 174.

2. But where these objects are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one to the other. *Ib.*

3. Cases may exist in which the one or the other may be preferred according to the circumstances. *Ib.*

4. In a case of doubtful construction, the claim of the party in actual pos-

session ought to be maintained, especially where it has been upheld by the decisions of the state tribunals. *Ib.*

5. If the monuments called for in a deed are uncertain, the courses and distances may identify them, or may dispense with the necessity of identifying some of them, by rendering the whole description, taken together, sufficiently certain. *Marshall v. Currie*, 4 C. 172 . . . ii. 58.

6. Where the description of boundaries in a deed are indefinite or uncertain, the construction given by the parties, and manifested by their acts on the land, is deemed the true one, unless the contrary be clearly shown. *Reed v. Proprietors of Locks and Canals*, 8 H. 274 . . . xvii. 585.

7. A deed called for a lot designated on a town plat as No. 183, bounded by a street and a river. *Held*, that if the jury were satisfied that the call for a river was a mistake, it might be rejected. *Barclay v. Howell's Lessee*, 6 P. 498 . . . x. 202.

8. A grant of an island by name, in the Potomac River, superadding the courses and distances of the lines thereof, which on resurvey, are now found to exclude part of the island, will pass the whole island. *Lodge's Lessee v. Lee*, 6 C. 287 . . . ii. 385.

9. Misnomer of the county in which the land was said in a patent from the State of Virginia to lie, is open to explanation, and does not, *per se*, avoid the grant. *Stringer v. Young's Lessee*, 3 P. 320 . . . viii. 430.

PUBLIC LANDS OF THE UNITED STATES, III. B. 5; WAY, 1.

#### G. EXCEPTIONS AND RESERVATIONS.

1. In a deed by which the grantor "doth grant, except as is hereinafter excepted," the exception is not out of a thing previously granted; but being incorporated into the granting clause itself, the thing excepted is not granted; and, therefore, there is no exception of a thing certain out of a thing certain granted. *Greenleaf's Lessee v. Birth*, 6 P. 302 . . . x. 126.

2. An exception of all squares and lots conveyed, or sold, or agreed to be conveyed, prior to a day named, by three persons, or either of them, is not void for uncertainty. *Ib.*

#### H. WHEN DEED NECESSARY.

1. A parol exchange of lands, or parol evidence that a conveyance was intended to operate as an exchange, will not convey any estate or interest in lands. *Clark v. Graham*, 6 W. 577 . . . v. 172.

2. A parol exchange of lands in Ohio, is not valid. *Morris v. Harmer's Heirs*, 7 P. 554 . . . x. 558.

#### I. OPERATION AND EFFECT, AND HEREIN OF CANCELLATION.

##### SEISIN AND DISSEISIN, A. B. D.

1. Conveyance in a marriage settlement, to the use of R. and M., the husband and wife, and the survivor of them, during their natural lives, "then to the

use and behoof of such child or children as shall or may be procreated between them, and to his, her, or their heirs or assigns forever ; but in case the said R. and M. shall have no child, and that such child or children shall die during the lifetime of R. and M., and M. should survive R. without issue, then to the use of M. and her heirs." *Held*, 1. That each child, when born, took a vested remainder in fee, subject to open and let in after-born children. 2. That this vested estate in fee was defeasible upon the contingency that the wife should survive the husband without issue. 3. That there was no objection to the limitation of a fee upon a fee in this manner, by way of shifting use. 4. That the existence of this executory limitation over to the wife did not render the preceding estate a contingent remainder, but a defeasible, though vested fee, the contingency attaching not to the prior, but to the subsequent estate. *Carver v. Jackson*, 4 P. 1....ix. 1.

2. If land be conveyed to trustees, in trust to sell and convey a fee-simple, they take a fee, without words of limitation. *Neilson v. Lagow*, 12 H. 98....xix. 46.

3. In Kentucky, the cancellation of a deed after its delivery, does not revest the title in the grantor. *Holmes v. Trout*, 7 P. 171....x. 442.

## DE FACTO AND DE JURE.

### CORPORATIONS, F. 1.

A government *de facto*, cannot grant lands contrary to a treaty by which it is bound. *United States v. Reynes*, 9 H. 127....xviii. 65.

### CLERKS OF COURTS, 6.

## DEMAND.

1. A demand, accompanied by abuse or insult, is not a legal demand. *Boyd v. Burke*, 14 H. 375....xx. 350.

2. But a subsequent demand cannot be refused by reason of prior misconduct, and to force an apology. *Ib.*

## DEMURRAGE.

### ADMIRALTY, E. ; DAMAGES.

## DEMURRER.

### EQUITY, B. g ; PLEADING, K. ; WAIVER.



## DEMURRER TO EVIDENCE.

PRACTICE, II. G. 1.

## DEPARTMENTS.

CONSTITUTIONAL LAW, C. 3; POST-OFFICE DEPARTMENT, A; SECRETARY OF  
THE TREASURY

## DEPOSITION.

EVIDENCE, C.

## DESCENT AND DISTRIBUTION.

ALIEN, B. C.; EVIDENCE, B. 1.

1. The statute of descents in Maryland has not declared how an intestate estate shall descend, which was derived to the intestate from his half brother or from his brother of the whole blood, or from his son or daughter, or from his wife; but such estates are left to descend as at common law. *Barnitz's Lessee v. Casey*, 7 C. 456....ii. 618.

2. Under the Virginia act of descents of 1785, § 19, it was necessary that the father should recognize illegitimate children as his own, after the law was enacted. *Stevenson's Heirs v. Sullivant*, 5 W. 207....iv. 617.

3. The 18th section of that act did not render a bastard capable of inheriting from a natural brother born after the marriage of their parents. *Ib.*

4. Under the statute of descents of Rhode Island, of 1822, the words "of the blood of the person from whom such estate came or descended," include next of kin of the half blood. *Gardner v. Collins*, 2 P. 58....viii. 22.

5. In the common law, and in the legislation of Rhode Island, the words "of the blood of another," include all who have any of the blood of that other; when it is intended to include only persons of the whole blood, the qualifying word is added. *Ib.*

6. In the same statute, the words "come by descent, gift or devise, from the parent or other kindred," mean immediate descent, gift, or devise, and make the immediate ancestor, donor, or devisor, the sole stock of descent. *Ib.*

7. In this case, the court declared that the complainant's wife was the only legitimate child of Daniel Clark, and as such, under the law of Louisiana, was entitled to one half the property of the said Clark; and a decree was made accordingly against the complainant, who was a purchaser under Clark's executors of a part of his real estate. *Patterson v. Gaines*, 6 H. 550....xvi. 813.

## DEVISE.

WILL.

## DIRECTORY AND MANDATORY.

CORPORATIONS, D. 3.

## DISCOVERY.

FOR TITLE BY, *see* LAW OF NATIONS, E.

1. A bill in equity for discovery and to charge the defendants with the payment of certain bills issued by a voluntary banking association of which they were members, such associations being prohibited under penalties by the law of the State where the business was carried on, cannot be maintained. *United States v. Saline Bank of Virginia*, 1 P. 100 . . . .vii. 477.

2. After discovery had, a suit for discovery merely cannot be revived. *Horsburg v. Baker*, 1 P. 232 . . . .vii. 546.

3. Where a female slave was conveyed for the life of the grantee, reserving to the grantor the reversion and right to her increase, with a clause of forfeiture upon any sale by the grantee, though the reversioner cannot have the aid of a court of equity to enforce the forfeiture, he may, to obtain discovery and an injunction to restrain alienation until the title can be tried at law. *Ib.*

4. After a verdict at law, the plaintiff cannot have a discovery, without making a case of accident, surprise, or fraud, and ignorance of the facts before verdict. *Brown v. Swann*, 10 P. 497 . . . .xii. 209.

## DISSEISIN.

SEISIN AND DISSEISIN.

## DISTRICT OF COLUMBIA.

CITIZEN; COURTS OF THE UNITED STATES, B. a. 2; JURISDICTION, D.

1. The acts of congress of the 27th of February, 1801, (2 Stats. at Large, 103,) and 3d of March, 1801, (2 Stats. at Large, 115,) did not enable the United States in their own name to recover a penalty, given by the law of Virginia to the person who should sue for the same, for an offence committed in that part of the District of Columbia which was ceded by Virginia. *United States v. Simms*, 1 C. 252 . . . .i. 408.

2. The fines mentioned in the second section of the last-mentioned act are such only as accrued by law, in whole or in part, to the government. *Ib.*

3. The separation of Alexandria from Virginia did not affect existing contracts between individuals. *Korn v. Mutual Assurance Society*, 6 C. 192.... ii. 364.

4. The insurance upon buildings in Alexandria did not cease by the separation, although the company could only insure houses in Virginia. *Ib.*

5. Under the act of February 27, 1801, (2 Stats. at Large, 108,) for the government of the District of Columbia, and the act of cession of Maryland, it was not necessary to file an exemplification of the record of a suit in chancery, in Maryland, in which a guardian had been ordered to convey land of his ward in the District, the deed having been made after congress assumed the jurisdiction. *Van Ness v. Bank of the United States*, 13 P. 17....xiii. 10.

6. Though the two counties of the District of Columbia are under the same political organization, yet congress has caused the laws of Virginia to continue in force within the one, and the laws of Maryland within the other; and a person declared by the laws of Maryland to be made free, by being brought within that State, is entitled to his liberty, though brought into the county of Washington, which was ceded by Maryland, from the county of Alexandria, which was ceded by Virginia, and though, by the law of Maryland, the owner could not directly manumit the slave, who was over forty-five years of age. *Rhodes v. Bell*, 2 H. 397....xv. 152.

7. Where an action has been removed from the circuit court in the county of Alexandria, to the same court in the county of Washington, pursuant to the 8th section of the act of June 24, 1812, (2 Stats. at Large, 757,) it may be referred to arbitrators pursuant to the laws of Maryland, for those laws govern the modes of proceeding after the removal. *Alexandria Canal Company v. Swann*, 5 H. 83....xvi. 315.

CONSTITUTIONAL LAW, A. 8-10; EXECUTORS, &c. A. 4-7, C. 4.

## DISTRICT COURTS.

ADMIRALTY; BANKRUPT LAWS, D.; CAPTURE; COURTS OF THE UNITED STATES; JURISDICTION; PRACTICE, II.; PUBLIC LANDS OF THE UNITED STATES, III. D. d. 2, 3.

## DIVISION OF OPINION.

JURISDICTION, A. d. 4.

## DOMICILE.

FOR EFFECT OF COMMERCIAL DOMICILE, see CAPTURE, F.

1. Rules concerning the evidence of domicile, stated. *Ennis v. Smith*, 14 H. 400....xx. 251.

2. A merchant having a fixed residence at the place of his birth, and carry

ing on business there, does not acquire a foreign commercial character by occasional visits to another country. *The Nereide*, 9 C. 388 . . . iii. 392.

3. A naturalized citizen, who, in time of peace, returns to his native country for the purpose of trade, but with the intention of returning again to his adopted country, continuing in the former a year after the knowledge of the existence of war between the two countries, for the purpose of winding up a complicated business, and engaging in no new commercial transactions whatever with the enemy, and actually returning to his adopted country in a little more than a year after his first knowledge of the war, is to be considered as having gained a domicile in his native country, and his goods, captured after the war, liable to condemnation. *The Frances*, 8 C. 335 . . . iii. 163.

4. Where a native citizen of the United States emigrated before a declaration of war to a neutral country, there acquired a domicile, and afterwards returned to the United States during the war, and reacquired his native domicile, he became a reintegrated American citizen; and could not afterwards, *flagrante bello*, acquire a neutral domicile by again emigrating to his adopted country. *The Dos Hermanos*, 2 W. 76 . . . iv. 31.

5. The native character does not revert, by a mere return to his native country, of a merchant, who is domiciled in a neutral country at the time of capture; who afterwards leaves his commercial establishment in the neutral country to be conducted by his clerks in his absence; who visits his native country merely on mercantile business, and intends to return to his adopted country. Under these circumstances, the neutral domicile still continues. *The Freundschaft*, 3 W. 14 . . . iv. 154.

## DOWER.

A. IN WHAT ESTATE, 160.

B. ASSIGNMENT OF, 161.

C. EXTINGUISHMENT OF RIGHT TO, 161.

### A. IN WHAT ESTATE.

1. If a wife join her husband in a lease for years, she is still entitled to dower in the rent. *Herbert v. Wren*, 6 C. 370 . . . ii. 575.

2. Under the laws of Maryland, a mortgage by husband and wife of his land, acknowledged by the wife upon privy examination, passed the legal estate and barred her right of dower; and of the equity of redemption, which was left in the husband, she was not dowable. *Stelle v. Carroll*, 12 P. 201 . . . xii. 693.

3. Under the law of Maryland, before the act of 1822, joint-tenancies existed, and the wife of a joint-tenant was not dowable of land so held. *Maybury v. Brien*, 15 P. 21 . . . xiv. 11.

4. Nor did the right of dower attach upon a momentary seisin, where the husband mortgaged back the land, at the same time when it was conveyed to him. *Ib.*

## B. ASSIGNMENT OF.

1. A court of chancery cannot allow a part of the purchase-money in lieu of dower, when the estate is sold, unless by consent of all parties interested. *Herbert v. Wren*, 6 C. 370 . . . . ii. 575.

2. Courts of chancery have concurrent jurisdiction with courts of law, in cases of dower, especially where partition, discovery or account is prayed, and in cases of sale where the plaintiff is willing that a sum in gross should be given in lieu of dower. *Ib.*

## C. EXTINGUISHMENT OF RIGHT TO. (ELECTION.)

1. If a devise of land in Virginia to the widow, appear from circumstances to be intended in lieu of dower, she must make her election, and cannot take both. *Herbert v. Wren*, 6 C. 370 . . . . ii. 575.

2. A clause releasing the right to dower was inserted in an indenture after the signatures of both husband and wife, and began: "And I, A. H., wife of H. H., &c." *Held*, That it was a part of the same deed, and was a valid release under the laws of Alabama. *Dundas v. Hitchcock*, 12 H. 256 . . . . xix. 123.

3. If a widow, who is also a devisee with a power of sale, release to a purchaser for a valuable consideration, she shall be deemed to convey in every character which enabled her to give effect to her deed; and she cannot set up that she conveyed only under a power; that she disaffirmed the provision for herself in the will, and took her dower, and did not release that. *Ib.*

*Supra*, A. 2.

## EJECTMENT.

## MESNE PROFITS.

A. PLEADING, 161.

B. PRACTICE, 162.

C. WHAT TITLE WILL OR NOT SUPPORT THE ACTION, 162.

D. WHAT DEFENCE MAY BE SHOWN, 163.

## A. PLEADING.

1. In Vermont, tenants in common may join in an action of ejectment. *Hicks v. Rogers*, 4 C. 165 . . . . ii. 57.

2. A general description of a lot, as lying between a certain street and river, is sufficient in ejectment. *Barclay v. Howell's Lessee*, 6 P. 498 . . . . x. 202.

3. Though the demise, laid in an action of ejectment, is a fiction, it must be so laid that, if true, the action would be supported. *Binney's Lessee v. Chesapeake and Ohio Canal Company*, 8 P. 214 . . . . xi. 73.

4. The date of the demise, under a *videlicet*, may be rejected as surplusage, if it appear by the declaration in ejectment that the ouster was after the entry under the demise. *Woodward v. Brown*, 13 P. 1....xiii. 1.

5. Where the right of entry is under the title of a *feme covert*, the demise may be laid in the names of the husband and wife, or in the name of the husband alone. *Ib.*

### B. PRACTICE.

1. Though an amendment extending the term in an action of ejectment might have been, and ought to have been allowed by the circuit court, a refusal to allow it cannot be assigned as error. *Walden v. Craig*, 9 W. 576....vi. 192.

2. In an action of ejectment for a tract of land, described in the declaration by metes and bounds, the jury may find a verdict for the plaintiff as to part of the tract, and for the defendant as to the residue; and if they do so, the judgment should conform to the verdict. It is error for the court to order a general verdict and judgment for the whole land, upon such a finding. *M'Arthur v. Porter*, 6 P. 205....x. 89.

3. If the defendant in ejectment dies, the judgment is to be revived against his heirs and the terre-tenants, but his executor need not be made a party to the *scire facias*. *Walden's Lessee v. Craig's Heirs*, 14 P. 147....xiii. 394.

4. In *scire facias*, to revive a judgment in ejectment, it is sufficient to aver that the term recovered is yet unexpired, without further describing it. *Ib.*

5. The court has jurisdiction to allow an amendment of the demise, laid in a declaration, after judgment, without notice, the parties being presumed to be before the court, for that and all other things in the power of the court, in the suit. *Ib.*

EXECUTORS, &c. A. 11; PRACTICE, II. E. 3.

### C. WHAT TITLE WILL OR NOT SUPPORT THE ACTION.

#### JUDGMENTS, &c. B. 3.

1. The rule that a plaintiff in ejectment must recover on the strength of his own title, must be limited and explained by the nature of each case as it arises. *Love v. Simm's Lessee*, 9 W. 515....vi. 161.

2. A mere intruder cannot enter on a person seised, eject him, and, when sued, question his title, or set up an outstanding title in another: the prior peaceable possession of the plaintiff is enough to enable him to recover in ejectment against one having no title. *Ohristy v. Scott*, 14 H. 282....xx. 183. *Same v. Findley*, 14 H. 296..., xx. 189. *Same v. Young*, 14 H. 296....xx. 189. *Same v. Henley*, 14 H. 297....xx. 189.

3. One tenant in common cannot maintain ejectment against his co-tenant, without actual ouster. *Barnitz's Lessee v. Casey*, 7 C. 456....ii. 618.

4. In Tennessee, tenants in common may declare on a joint demise, and recover according to the title adduced. *Poole v. Fleegeer*, 11 P. 185....xii. 895.

5. The plaintiff in ejectment having shown title in himself, to 50,000 acres, excepting thereout 11,000 acres, is bound to prove a trespass by the defendant

on some part of the tract of 50,000 acres not included in that of 11,000. *Hawkins v. Barney's Lessee*, 5 P. 457 . . . ix. 423.

6. In ejectment, if it appear that the lessor died before the date of the demise laid in the declaration, the plaintiff cannot recover. *Connor v. Bradley*, 1 H. 211 . . . xiv. 574.

7. Under the 4 Geo. II. c. 28, to give a right to recover in ejectment for non-payment of rent, it must be proved that on some day between the time when the rent fell due and the day of the demise, there was not, on the land, sufficient property liable to distress to countervail the arrears, and this must appear from the result of an examination of every part of the premises. *Ib.*

#### D. WHAT DEFENCE MAY BE SHOWN. (JUDGMENTS, &c. B. 3.)

1. Though a stranger cannot set up an outstanding satisfied mortgage, to defeat an action of ejectment, yet the equitable owner of the land may do so. *Peltz v. Clarke*, 5 P. 481 . . . ix. 435.

2. An outstanding title may be set up by the defendant in an action of ejectment, where the plaintiff claims solely under a paper title, and the effect of the outstanding title is to show that nothing passed to the plaintiff by his paper title. *Marsh v. Brooks*, 8 H. 228 . . . xvii. 565.

3. A conveyance *pendente lite*, by the lessor in ejectment, does not defeat the action. *Robinson v. Campbell*, 3 W. 212 . . . iv. 200.

4. It is not a defence to an action of ejectment, that the defendant holds a bond of the plaintiff, conditioned to convey the land to him. He must resort to a court of equity. *Watkins v. Holman's Lessee*, 16 P. 25 . . . xiv. 174.

5. The grantee of one tenant in common may defend his possession upon that title. *Webster v. Reid*, 11 H. 437 . . . xviii. 678.

DEDICATION, 2-5.

### ELECTION.

DOWER, C.; HUSBAND AND WIFE, B.

Where a testator had given a bond to vest in trustees for his intended wife a sum of money, and the interest, for her maintenance, and the marriage was solemnized, and by his will the testator made a provision for his wife, it was held, under the circumstances, that the bequest was in lieu of the settlement, but that the wife had her election to take either. *Hunter v. Bryant*, 2 W. 82 . . . iv. 18.

### EMBARGO AND NON-INTERCOURSE.

FOR POWER OF CONGRESS RESPECTING, *see* CONSTITUTIONAL LAW, A.

A. ACTS WHICH ARE OR ARE NOT PROHIBITED, 164.



## B. PENALTIES AND FORFEITURES, 166.

## C. PROCEDURE, 166.

## A. ACTS WHICH ARE OR ARE NOT PROHIBITED. (VIS MAJOR.)

1. An embargo bond, conditioned to land a cargo at some port in the United States, "dangers of the seas excepted," is not forfeited, if the vessel be forced by stress of weather to put away for a foreign port, and the cargo is there landed by an order of the local government. *United States v. Hall*, 6 C. 171 . . . .ii. 355.

2. If a vessel go to an interdicted port, it is incumbent on the claimant to excuse the *prima facie* breach of the law, by proving clearly the necessity for doing so. *Brig James Wells v. United States*, 7 C. 22 . . . .ii. 440.

3. Under the 3d section of the embargo act of January 9, 1808, (2 Stats. at Large, 453,) a mere transshipment of cargo from one vessel to another, in a port of the United States, did not work a forfeiture. *Schooner Paulina's Cargo v. United States*, 7 C. 52 . . . .ii. 452.

4. It is not a violation of the act of congress of June 13, 1798, (1 Stats. at Large, 565,) for the master of a vessel, driven by stress of weather to enter into a French port, and there land her cargo, part being seized for the use of the government, and the residue not permitted to be reladen, or sold, except for the produce of the country, to take away such produce. *Hallet v. Jenks*, 3 C. 210 . . . .i. 560.

5. A vessel and cargo belonging to one, who though born in the United States, was a resident in a Danish island, and had taken an oath of allegiance to the king of Denmark, is not liable to forfeiture under the act of the 27th of February, 1800, (2 Stats. at Large, 7,) suspending intercourse with France. *Murray v. Schooner Charming Betsey*, 2 C. 64 . . . .i. 450. *Sands v. Knox*, 3 C. 499 . . . .i. 649.

6. A person thus circumstanced is not under the protection of the United States. *Ib. Ib.*

7. The 5th section of the act of the 9th of February, 1799, (1 U. S. Stats. at Large, 615,) does not authorize the seizure of a vessel bound from a French port. *Little v. Barreme*, 2 C. 170 . . . .i. 465.

8. Produce of a foreign country once imported into the United States, and exported thence to a foreign port, cannot be again brought hither under the non-intercourse act of March 1, 1809, (2 Stats. at Large, 528.) *Schooner Hoppet v. United States*, 7 C. 389 . . . .ii. 585.

9. Under the non-intercourse laws in force, March 15, 1811, a vessel could not lawfully sail from a foreign port with a cargo, bound for a port of the United States, and come into the waters of the United States, for the purpose of making inquiry if she might land her cargo. *Brig Penobscot v. United States*, 7 C. 356 . . . .ii. 568.

10. If the vessel of neutrals be destroyed by captors on the high seas, it is not a violation of the non-intercourse act, 2 Stats. at Large, 528, to return to the United States in a vessel given to them on the high seas, and to bring in her cargo. *The Adventure*, 8 C. 221 . . . .iii. 100.

11. Under the non-intercourse act of June, 28, 1809, (2 Stats. at Large, 550,)

a vessel could not proceed to a prohibited port, even in ballast. *The Ship Richmond v. United States*, 9 C. 102....iii. 285.

12. Under the non-intercourse act of 1809, (2 Stats. at Large, 528,) a vessel from Great Britain had a right to lay off the coast of the United States, to receive instructions from her owners in New York; and if necessary, to drop anchor, and in case of a storm, to make a harbor; and if prevented by a mutiny of her crew from putting out to sea again, might wait in the waters of the United States for orders. *United States v. The Cargo of the Ship Fanny*, 9 C. 181....iii. 322.

13. A question of fact under the non-intercourse act of the 28th of June, 1809, (2 Stats. at Large, 550.) *The Octavia*, 1 W. 20....iii. 451.

14. Under the 8d section of the act of congress, of the 28th of June, 1809, (2 Stats. at Large, 550,) every vessel bound to a foreign permitted port, was obliged to give a bond, with condition not to proceed to any port with which commercial intercourse was not permitted, nor to trade with such port. *The Edward*, 1 W. 261....iii. 540.

15. The non-intercourse act of the 18th of April, 1818, (3 Stats. at Large, 432,) does not prohibit the coming of British vessels from a British closed port, through a foreign port, (not British,) where the continuity of the voyage is fairly broken. *The Pitt*, 8 W. 371....v. 450.

16. If a British ship come from a foreign port (not British) to a port of the United States, the continuity of the voyage is not broken, and the vessel is not liable to forfeiture under the act of April 18, 1818, (3 Stats. at Large, 432,) by touching at an intermediate British closed port, from necessity, in order to procure provisions, without trading there. *The Frances and Eliza*, 8 W. 398....v. 458.

17. Under the embargo act of January 9, 1808, (2 Stats. at Large, 453, § 3,) a departure from port without a clearance is necessary to consummate the offence. *Sloop Active v. United States*, 7 C. 100....ii. 469.

18. Sailing within the port, with intent to depart, is not sufficient. *Ib.*

19. The embargo act of the 25th of April, 1808, (2 Stats. at Large, 499,) related only to vessels ostensibly bound to some port in the United States, and a seizure after the termination of the voyage is unjustifiable; and no further detention of the cargo is lawful than what is necessarily dependent on the detention of the vessel. *Otis v. Walter*, 2 W. 18....iv. 7.

20. It is not indispensable to the termination of a voyage that the vessel should arrive at her original destination; but it may be produced by stranding, stress of weather, or any other cause inducing her to enter another port with a view to terminate her voyage *bonâ fide*. *Ib.*

21. But if a vessel, not actually arriving at her port of original destination, excites an honest suspicion in the mind of the collector that her demand of a permit to land the cargo was merely colorable, this is not a termination of the voyage so as to preclude the right of detention. *Ib.*

22. Under the embargo act of the 22d December, 1807, (2 Stats. at Large, 451,) the words "an embargo shall be laid," not only imposed upon the public officers the duty of preventing the departure of registered or sea-letter vessels on a foreign voyage, but prohibited their sailing, and consequently rendered them liable to forfeiture under the supplementary act of the 9th of

January, 1808, (2 Stats. at Large, 453.) *The William King*, 2 W. 148.... iv. 63.

23. In such case, if the vessel be actually and *bond fide* carried by force to a foreign port, she is not liable to forfeiture. *Ib.*

24. The court being of opinion, under the facts and circumstances of the case, that the capture under which it was alleged the vessel was compelled to go to a foreign port, was fictitious and collusive, the decree of condemnation in the court below was affirmed. *Ib.*

25. Under the embargo act of January 9, 1808, (2 Stats. at Large, 453, s. 3,) the offence was not complete until the arrival of the vessel at a foreign port. But on her return, the vessel was liable to seizure. *United States v. Brig Eliza* 7 C. 113....ii. 476.

### B. PENALTIES AND FORFEITURES.

1. The act of March 12, 1808, (2 Stats. at Large, 473,) does not inflict a forfeiture, if the vessel was forced by stress of weather into an interdicted port. *Durousseau v. United States*, 6 C. 307....ii. 412.

2. The 2d section of the embargo act of April 25, 1808, (2 Stats. at Large, 499,) only directs a clearance, but does not inflict any forfeiture. *Schooner Paulina v. United States*, 7 C. 52....ii. 452.

3. The forfeiture of goods, for violation of the non-intercourse act of March 1, 1809, (2 Stats. at Large, 528,) takes place upon the commission of the offence, and avoids subsequent sale to an innocent purchaser, although there may have been a regular permit for landing the goods, and although the duties may have been paid. *United States v. One Thousand Nine Hundred and Sixty Bags of Coffee*, 8 C. 398....iii. 188; *United States v. The Mars*, 8 C. 417.... iii. 199.

### C. PROCEDURE.

1. By the 11th section of the act of 25th April, 1808, (2 Stats. at Large, 501,) the collector had no right to detain a vessel and cargo after her arrival at her port of destination, under a suspicion that she intended to violate the embargo. *Otis v. Bacon*, 7 C. 589....ii. 677.

2. Under the 11th section of the embargo act, of 25th April, 1808, (2 Stats. at Large, 499,) the collector was justified in detaining a vessel by his honest opinion that there was an intention to violate or evade the provisions of the embargo laws. It was not necessary for him to show that his suspicion was reasonable. *Crowell v. M'Fadon*, 8 C. 94....iii. 38.

3. Under the embargo law of April 25, 1808, (2 Stats. at Large, 499, § 11,) the collector was justified in detaining a vessel, if he, in fact, entertained an opinion that the law was about to be violated; he was not bound to show probable cause for that opinion, or due diligence in forming it. *Otis v. Watkins*, 9 C. 339....iii. 374.

4. But it was competent for the ship-owner to show malice, and that the collector acted from that motive, and in fact had not the said opinion. *Ib.*

5. Where a seizure was made, under the 11th section of the embargo act of

April, 1808, (2 Stats. at Large, 499,) it was determined that no power is given by law to detain the cargo if separated from the vessel, and that the owner had a right to take the cargo out of the vessel, and to dispose of it in any way not prohibited by law ; and, in case of its detention, to bring an action of replevin therefor in the state court. *Slocum v. Mayberry*, 2 W. 1 . . . .iv. 1.

6. Under the embargo act of the 25th April, 1808, (2 Stats. at Large, 499,) if a vessel, not actually arriving at her port of original destination, excites an honest suspicion in the mind of the collector that her demand of a permit to land the cargo was merely colorable, this is not a termination of the voyage so as to preclude the right of detention. *Otis v. Walter*, 6 W. 583 . . . .v. 175.

7. During the detention of the vessel, if the collector actually believes that the cargo can be best preserved by landing it, and will do it at his own expense, such a landing is not necessarily a conversion. *Ib.*

8. Under the embargo act of the 25th of April, 1808, (2 Stats. at Large, 499,) the collector is protected in the honest exercise of his discretion in detaining the vessel and securing both vessel and cargo, until an actual termination of the voyage. *Otis v. Walter*, 11 W. 192 . . . .vi. 557.

9. Whether the voyage has terminated is a question of fact, and if the voyage be colorably, but not really terminated, the collector may detain the vessel, if he has honest suspicions. *Ib.*

## EMINENT DOMAIN.

CONSTITUTIONAL LAW, J. 23.

## ENTAILS.

The settled construction of the act of New York, for abolishing entails, passed in 1786, is, that it includes estates tail in remainder and vests in the remainderman a fee-simple, subject only to the life-estate of the tenant in possession ; and this construction of the statute, by which a rule of property has been established, is followed by this court. *Van Rensselaer v. Kearney*, 11 H. 297 . . . .xviii. 631.

## EQUITY.

FOR PRINCIPLES OF EQUITY LAW, AND FOR SPECIFIC REMEDIES, see APPROPRIATE TITLES.

A. JURISDICTION, 168.

B. PLEADING, 170.

a. GENERALLY.

b. OF AN ORIGINAL BILL.

1. PARTIES.

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## c. OF A SUPPLEMENTAL BILL.

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## 10. REHEARING.

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## 12. DECREES, AND HEREIN OF TAKING BILLS, PRO CONFESSO.

## A. JURISDICTION.

ACCOUNT, B.; CHARITY, C.; DOWER, B.; INJUNCTION; INTERPLEADER; JUDGMENTS AND DECREES, E.; LAWS OF THE SEVERAL STATES, B. 7; LIEN, B.; MISTAKE; PUBLIC LANDS OF THE UNITED STATES, IV. B. C.; TRUSTS.

1. The 16th section of the judiciary act, (1 Stats. at Large, 82,) which prohibits suits in equity where there is a plain, adequate, and complete remedy at law, is merely declaratory, making no alteration in the rules as to equitable remedies. *Boyce's Executors v. Grundy*, 3 P. 210....viii. 377.

2. To determine whether there is a plain, adequate, and complete remedy at law, so as to prevent a resort to the equitable powers of the courts of the United States, reference must be had to the principles of the common law of England, and not to the laws of the State where the court sits. *Robinson v. Campbell*, 3 W. 212....iv. 200.

3. If the state laws have given a legal remedy founded on an equitable title, the equity jurisdiction of the circuit court is not affected thereby. *Ib.*

4. To bar a suit in equity, the remedy at law must be as efficient to the ends of justice, and its complete and prompt administration, as the remedy in equity. *Boyce's Executors v. Grundy*, 3 P. 210....viii. 377.

5. If an equitable title be merged in a grant, the party has no relief in equity *Preston v. Tremble*, 7 C. 354....ii. 567.

6. In a case of fraud, trust, or contract, the jurisdiction of a court of equity is sustainable, wherever the person is found, though the decree may affect lands without its jurisdiction. *Massie v. Watts*, 6 C. 148....ii. 345.

7. Fraud being alleged, equity has jurisdiction. *Shelton v. Tiffin*, 6 H. 168....xvi. 643.

8. Although courts of equity have concurrent jurisdiction with courts of law, in all matters of fraud, yet, where the cause has already been tried and determined by a court of law, a court of equity cannot take cognizance of it, unless there be the addition of some equitable circumstance to give jurisdiction. *Smith v. M'Iver*, 9 W. 532....vi. 169.

9. In such a case, some defect of testimony or other disability, which a court of law cannot remove, must be shown as a ground for resorting to a court of equity. *Ib.*

10. If a court of equity has jurisdiction to compel a discovery, it may go on and give relief, though the claim be legal; but it will not do so, if no material discovery is made by the answer. *Russell v. Clark's Executors*, 7 C. 69....ii. 459.

11. A court of equity will not interfere between a donee of land by deed, and a devisee under a will of the donor, in a case where there is no fraud. *Viers v. Montgomery*, 4 C. 177....ii. 61.

12. A court of equity has not jurisdiction of a bill which states only that the complainant, being a judgment creditor, obtained an execution, and had it levied by the marshal, on property of the debtor, and that this property was taken from the marshal by the sheriff, under an order of a state court of chancery, founded on a fraudulent deed of trust, under which the person named as defendant pretends to claim the property. There is a plain and complete remedy at law. *Knox v. Smith*, 4 H. 298....xvi. 122.

13. A court of the United States cannot enjoin proceedings in a state court. *Diggs v. Wolcott*, 4 C. 179....ii. 63.

14. Though the land law of Kentucky furnishes a remedy for trying, at law, rights under entries, previous to the emanation of a patent, yet a court of equity has jurisdiction, upon the ground that an entry is notice, and a legal title afterwards acquired is subject to the equitable right. *Bodley v. Taylor*, 5 C. 191....ii. 228.

15. This jurisdiction is to be exerted, in conformity with the principles of equity, and not merely upon the rules which would govern a court of law. *Ib.*

16. A decree having been made for a sale of real property conveyed to a trustee to secure payment of a debt, a bill does not lie to restrain the sale on account of a claim to set-off an independent debt, no peculiar equity, such as the insolvency of the debtor, the plaintiff in the first suit, having intervened. *Dade v. Irwin*, 2 H. 883....xv. 146.

17. Courts of equity do not take jurisdiction to compel offsets of unconnected debts, generally; there must be some special ground for the relief, such as mutual credit on the faith of the debts. *Ib.*

18. A court of equity will not interfere to compel an offset of a stale and suspicious claim. *Ib.*

19. The question whether the title of a township to the sixteenth section reserved for school lands by the acts of March 3, 1803, (2 Stats. at Large, 283,) and April 21, 1806, (2 Stats. at Large, 401,) shall prevail against the title of a Choctaw Indian, under his actual occupancy, and the relinquishment to him of the ultimate title of the United States by treaty, is a question of law, and a court of equity should not pass upon it in a bill for that purpose only. *Gaines v. Nicholson*, 9 H. 356....xviii. 174.

20. A court of equity has jurisdiction to compel a bank to open its transfer books and permit a transfer of its stock. *Mechanics' Bank of Alexandria v. Seton*, 1 P. 299....vii. 585.

21. Where all the property of the late Bank of the United States had been assigned by a general assignment in trust to assignees, for the purpose of liquidating its affairs, it is clear that a suit in equity may be maintained by the assignees against the parties to the notes. *Lenox v. Roberts*, 2 W. 373....iv. 139.

22. In Kentucky, where a holder of a note or bill can have no remedy at law against a remote indorser, he may sue him in equity. *Bank of the United States v. Weisiger*, 2 P. 331....viii. 129.

23. It is of no importance that the indorser received no consideration. *Ib.*

24. In that State, every reasonable effort must be made to recover of the drawer before resorting to the indorser. *Ib.*

25. If the obligee of a bond obtain titles in his own name for part of the lands, the assignment of which to the obligor was the consideration of the bond, and suffer the titles to the residue of the lands to be lost by the non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law upon the bond. *Skillern's Executors v. May's Executors*, 4 C. 137....ii. 45.

26. Though it may be necessary to ascertain unliquidated damages, this does not defeat the jurisdiction of a court of equity; it may be done by a master, or by an issue of *quantum damnificatus*. *Kelsey v. Hobby*, 16 P. 269....xiv. 290.

27. A court of equity cannot make a decree for the penalties incurred for violation of copyright. *Stevens v. Gladding*, 17 H. 447....xxi. 604.

28. But may decree an account of profits under the prayer for general relief. *Ib.*

CONTRACT, C. 14; DISCOVERY, 3; EXECUTORS, &c. A. 17; PARTNERSHIP, D. 1; SPECIFIC PERFORMANCE, B. 7.

## B. PLEADING.

### a. GENERALLY.

*Infra*, B. b. 4.

### b. OF AN ORIGINAL BILL.

#### 1. PARTIES.

1. Rules respecting the joinder and dispensing with parties to suits in equity in the courts of the United States. *Shields v. Barrow*, 17 H. 180....xxi. 409.

2. A contract cannot be rescinded by a decree, without having before the



court all the parties whose rights will be affected thereby ; and an entire contract of compromise cannot be rescinded in part, and left to stand as to the residue. *Ib.*

3. The act of February 28, 1839, (5 Stats. at Large, 321,) relates solely to the non-joinder of persons out of the reach of process. *Ib.*

4. The 47th rule for equity practice is only a declaration of the effect of previous decisions of this court, and does not enable a circuit court to make a decree which must affect the rights of absent persons. *Ib.*

5. Under the Stat. 5 Geo. II., making lands in the colonies liable for debts, the lands of a deceased debtor in Georgia may be so charged without making the heir a party to the suit for that purpose. *Telfair v. Stead's Executors*, 2 C. 407....i. 514.

6. To a bill by purchasers from the judgment debtor, to set aside a legal title to lands obtained by the levy of an execution, upon the ground that the judgment was satisfied before the levy, both the judgment debtor and creditor are necessary parties, though the judgment creditor was not a purchaser under the levy. *Field v. Holland*, 6 C. 8....ii. 303.

7. Being made parties, the answer of the judgment creditor is evidence against the complainants ; but the answer of the judgment debtor is not evidence in their favor against the other defendants. *Ib.*

8. Assignees in bankruptcy are indispensable parties to a bill against the bankrupt and certain persons to whom he conveyed property in trust before he was decreed a bankrupt. *Russell v. Clark's Executors*, 7 C. 69....ii. 459.

9. Upon a bill filed by the United States, proceeding as ordinary creditors against the debtor of their debtor for an account, &c., the original debtor to the United States ought to be made a party, and the account taken between him and his debtor. *United States v. Howland*, 4 W. 108....iv. 360.

10. A judgment at law cannot be enjoined without making the judgment creditor a party ; it is not enough that the defendant admits himself to be the owner of the judgment ; such an admission may be collusive. *Marshall v. Beverley*, 5 W. 313....iv. 641.

11. A bill in equity to enjoin a judgment at law is not to be considered as an original bill, and therefore it is not necessary in a court of limited jurisdiction to make other parties, if the introduction of those parties should create a doubt as to the jurisdiction of the court. *Simms v. Guthrie*, 9 C. 19....iii. 236.

12. A final decree in equity, or an interlocutory decree, which in a great measure decides the merits of the cause, cannot be pronounced until all the parties to the bill, who are parties in interest, are before the court. *Conn v. Penn*, 5 W. 424....iv. 690.

13. In a suit demanding the specific performance of a contract, by conveying lands in the State of Ohio, stipulated to be conveyed as the consideration for other lands sold in the State of Kentucky, or, in lieu thereof, requiring indemnification by the payment of money ; it was held, that all the co-heirs of the vendor, deceased, ought to be made parties to the bill, and that the death of one of the heirs ought to be proved, in order to excuse his omission as a party to the bill. *Morgan's Heirs v. Morgan*, 2 W. 290....iv. 110.

14. This court will not suffer its jurisdiction, in an equity cause, to be ousted, by the circumstance of the joinder or non-joinder of merely formal parties.

who are not entitled to sue, or liable to be sued, in the United States courts. *Wormley v. Wormley*, 8 W. 421 . . . . v. 469.

15. The joinder of unnecessary parties, not capable of being sued by the complainant in the circuit court, because citizens of the same State as the complainant, does not prevent the court from making a decree against those who are citizens of another State. *Carneal v. Banks. Banks v. Carneal*, 10 W. 181 . . . . vi. 371.

16. The act of February 28, 1839, (5 Stats. at Large, 321,) does not enable a circuit court to proceed in equity, in the absence of a party whose interests must necessarily be affected by any decree in favor of the complainants. *Northern Indiana Railroad Company v. Michigan Central Railroad Company*, 15 H. 233 . . . . xx. 490.

17. If a case in equity can be completely decided, as between the litigant parties, an interest in some other person, who cannot be reached by process, should not prevent a decree. *Elmendorf v. Taylor*, 10 W. 152 . . . . vi. 360.

18. When the proper parties are not within the jurisdiction, and a decree may be made without affecting their interests, the plaintiff is excused from joining them by the first section of the act of February 28, 1839, (5 Stats. at Large, 321.) *Union Bank of Louisiana v. Stafford*, 12 H. 327 . . . . xix. 160. *New Orleans Canal and Banking Company v. Stafford*, 12 H. 843 . . . . xix. 168.

19. Though it may not be necessary to bring before the court all the members of a voluntary banking association, as defendants to a bill, to charge the private property of members with the redemption of the notes issued by the bank, yet defendants who are actually made parties must all be regularly proceeded against, and their representatives brought in, in case of death. *Mandeville v. Riggs*, 2 P. 482 . . . . viii. 186.

20. Where a bill was filed by some of the heirs of a deceased person, to set aside a deed procured from the ancestor by fraud, and the court ordered a sale of the estate to pay the charges equitably due to the grantee, for advances, &c., it was held to be necessary that all the heirs should be made parties before such a sale can be ordered. *Harding v. Handy*, 11 W. 103 . . . . vi. 529.

21. Though the rules as to parties in equity are somewhat flexible, yet where the court can make no decree between the parties before it, upon their own rights, which are independent of the rights of those not before it, it will not act. *Mallow v. Hinde*, 12 W. 193 . . . . vii. 116.

22. An objection for want of parties ought not to prevail at the hearing, on appeal, except when the party is indispensably necessary. *Mechanics' Bank of Alexandria v. Seton*, 1 P. 299 . . . . vii. 585.

23. To a bill for specific performance of a contract to convey land, the vendor is a necessary party, though he has parted with all title, and his grantees are made parties. *Findlay v. Hinde*, 1 P. 241 . . . . vii. 552.

24. A legacy being given jointly to several families, whose individual members were not ascertained by the will, all the legatees are necessary parties to a bill for payment of the legacy. *Pray v. Belt*, 1 P. 670 . . . . vii. 760.

25. A trustee, in whose name bank stock stands, and who is willing to transfer it to his *cestuis que trust*, is not a necessary party to a bill against the bank to compel it to allow a transfer. *Mechanics' Bank of Alexandria v. Seton*, 1 P. 299 . . . . vii. 585.

26. An objection to the joinder of an assignor, with an assignee, as complainant in a bill, comes too late on an appeal. *Livingston v. Woodworth*, 15 H. 546....xx. 624.

27. Certain persons, being members of a voluntary religious association, may maintain a bill in equity in behalf of themselves and all the other members, to protect from violation a burial-ground, in which the members of the association have been accustomed to make interments, and which had been dedicated to that pious use by the owner of the soil, in whose heir the legal title was vested. And under such a bill the holder of the legal title may be enjoined. *Beatty v. Kurtz*, 2 P. 566....viii. 212.

28. Under a bequest directing executors to invest a certain fund, and from the interest pay for "the proper education of A, B, and C, so that they may severally be fitted and accomplished in some useful trade, and to each of them who should live to finish his education, or to reach the age of twenty-one years," is bequeathed a legacy of £100, *held*: 1. That all three were necessary parties to a bill for the execution of the trust. *Dandridge v. Custis*, 2 P. 370....viii. 143.

29. That education for one of the learned professions was not intended by the testatrix. *Ib.*

30. That the residuary legatees under the will, though entitled to any residue of this fund remaining after the execution of this trust, were not necessary parties. *Ib.*

31. Where a decree set aside certain conveyances as fraudulent, as against creditors, but expressly exempted a certain mortgage from the effect of the decree, it was held that the mortgagee was not a necessary party to the bill. *Venable v. Bank of the United States*, 2 P. 107....viii. 36.

32. Though a court of equity may order a sale of the particular interest of a party, without bringing before the court other parties, having other interests in the same lands, yet, ordinarily, this will not be done, for it is a leading object to make a final adjustment of all questions between all parties, and thus put an end to litigation, and assure the title of a purchaser. *Caldwell v. Taggart*, 4 P. 190....ix. 49.

33. Though the complainant may be obliged to join a party who is within the jurisdiction in order to a final decree, yet if his joinder would defeat the jurisdiction, and the decree can be so framed as not to affect his interest, he may be stricken out, and the suit may proceed against the other defendants. *Vattier v. Hinde*, 7 P. 252....x. 469.

34. On a bill for payment of a legacy, the answer of the administrator with the will annexed showed, that another bill had been filed against him by persons claiming as creditors, or mortgagees, and a third, by persons claiming as heirs at law, and distributees. *Held*, that the heirs at law and distributees were necessary parties, and the decree was reversed, and the suit remanded, to enable the plaintiff to amend. *Armstrong v. Lear*, 8 P. 52....xi. 25.

35. If both the complainant and defendant, in a bill to obtain the legal title, claim under and assert the validity of a conveyance, it is not necessary to make the parties to that conveyance parties to the bill. *Boon's Heirs v. Chiles*, 8 P. 532....xi. 205.

36. And if the complainant's equity depends on the invalidity of an assign-

ment of his equity, if the defendant is the sole assignee, and his assignor parted with all his title, he need not be joined as a defendant. *Ib.*

37. To a bill to enjoin a judgment by an indorsee against an indorser of a bill of exchange, upon the ground that it has been paid by the drawer, without the knowledge of the complainant, before the judgment was recovered, the drawer is not a necessary party. *Atkins v. Dick*, 14 P. 114....xiii. 378.

38. Whether a sub-purchaser of part of the land, from the vendee, is a necessary party or not, to a bill against the vendor for specific performance, his joinder, under circumstances which had no practical effect on the vendor's rights, cannot be objected to by the vendor. *Taylor v. Longworth*, 14 P. 172....xiii. 414.

39. It is too late to take, for the first time, an objection of non-joinder of a party, at the hearing, if a decree can be made between the parties before the court, without affecting the interests of those not before the court. *Story v. Livingston*, 13 P. 159....xiii. 196.

40. The assignor, who still retains an interest in the patent, though none in the particular territory in question, may join as a complainant in a bill for an injunction to restrain the violation of the patent in that territory. *Woodworth v. Wilson*, 4 H. 712....xvi. 276.

41. In a bill against an executor to obtain an account and payment of a legacy, it is not necessary to join, as a defendant, a devisee of a tract of land in another jurisdiction, *West v. Smith*, 8 H. 402....xvii. 636.

42. Though some special case must be made to authorize a bill by a creditor against an administrator of the deceased debtor, and a third person having assets of the deceased, to subject those assets to the payment of his debt, yet it is not necessary to charge collusion between the defendants; it is enough that the third person held all the property of the deceased under a secret trust in fraud of creditors; insists on retaining the property to his own use; that the administrator has not proceeded against him for the space of about two years, and resists the bill by relying on the statute of limitations. *Hagan v. Walker*, 14 H. 29....xx. 17.

43. In such a case the court has original jurisdiction, and does not act merely to aid an execution at law; therefore, it is not necessary for the creditor to show that he has a judgment lien on the property, or that if the fraudulent title were removed he could at once proceed to levy an execution, as would be indispensable if the ancillary jurisdiction was appealed to. *Ib.*

44. Where it is the object of the bill to procure a sale of land and subject the proceeds to the payment of the complainant's debt, a prior encumbrancer is a necessary party; but where the existence of the prior encumbrance is admitted, and the complainant seeks only for a sale subject thereto, the court may, and in a case where his joinder would defeat the jurisdiction, will, decree such a sale, in the absence of the prior encumbrancer. *Ib.*

45. To a bill to charge a legacy on land of a married woman, she is a necessary party. *Lewis v. Darling*, 16 H. 1....xxi. 1.

CHURCH, 15-19; INFORMATION, 1; PARTNERSHIP, D. 1, 2; PROCEEDING  
AMI, 1; PUBLIC LANDS OF STATES, A. 76.

## 2. MULTIFARIOUSNESS.

1. No abstract rule as to what is multifariousness can be laid down. *Oliver v. Piatt*, 3 H. 333 . . . . xv. 479.

2. If entire justice cannot so conveniently be done against the same defendants, without uniting different subjects, they may be united in a bill. *Ib.*

3. Though the court can, *sua sponte*, refuse to proceed at the hearing, because of multifariousness, the defendant can object on account of it, only by plea, or answer, or demurrer. *Ib.*

4. It is not practicable to define multifariousness; each case must be examined in reference to the leading principles, not to subject one party to a litigation between others in which he has no interest, and not to allow an unnecessary multiplicity of suits. *Gaines v. Chew*, 2 H. 619 . . . . xv. 236.

5. A bill which claims different parcels of land, as devisee, or heir at law, and shows that each defendant claims in severalty as a purchaser under a will, which the bill impeaches, and the effect of which to devise any of the lands, the bill controverts, is not multifarious, though the case of each defendant who may claim protection as a *bonâ fide* purchaser without notice, is distinct from the cases of all the others. *Ib.*

6. An objection to a bill for multifariousness cannot be taken by the defendant for the first time, after answer. *Nelson v. Hill*, 5 H. 127 . . . . xvi. 331.

7. Several different underwriters, having claims to a return of moneys by them severally paid, on account of a loss, cannot unite in one bill. *Yeaton v. Lenox*, 8 P. 123 . . . . xi. 43.

## 3. PRAYER.

1. Under a general prayer for relief, only relief consistent with the case made in the bill can be granted; even where there is a cross-bill, which states a case upon which more extensive relief is proper. *English v. Foxall*, 2 P. 595 . . . . viii. 222.

2. Under a general prayer for relief, a specific performance may be decreed. *Tayloe v. Merchants' Fire Insurance Company*, 9 H. 890 . . . . xviii. 191.

3. Where a bill is framed to obtain a specific performance of an agreement to convey land, under a prayer for general relief, the court cannot order a sale of the land, even if the proofs would justify such relief; the bill should have been framed with a double aspect, and with alternative prayers. *Hobson v. M<sup>r</sup> Arthur*, 16 P. 182 . . . . xiv. 241.

4. Where the vendee is shown by the bill to have been in possession, and specific performance is refused, under the prayer for general relief, a decree for an account of rents and profits may be made against the vendee; and this court reversed the decree of the circuit court in order to direct such an account, though the claim for it was not made in the circuit court. *Watts v. Waddle*, 6 P. 389 . . . . x. 164.

5. If a bill charges actual fraud and designed imposition, and prays for relief on that ground under the prayer for general relief, the complainant cannot rely on circumstances which may amount to a case for relief under a distinct head of equity, though those circumstances substantially appear in the

bill, being charged there as aiding to make out the case of actual fraud. *Eyre v. Potter*, 15 H. 42 . . . . xx. 398.

6. This rule applied to a purchase from a widow, by her step-son. *Ib.*

*Supra*, A. 28.

#### 4. OTHER MATTERS. (CONSIDERATION; INFORMATION.)

1. A complainant in equity cannot obtain a decree for more than he has asked in his bill. *Simms v. Guthrie*, 9 C. 19 . . . . iii. 236.

2. The complainant cannot have relief on a case not made by his bill, but by the answer. *Knox v. Smith*, 4 H. 298 . . . . xvi. 122.

3. The fact relied on to procure a rescission of a contract, not being averred in the bill, no decree can be rested on it. *Carneal v. Banks; Banks v. Carneal*, 10 W. 181 . . . . vi. 371.

4. If the statute of limitations is pleaded to a bill, the plaintiff cannot rely on the exception of non-residence, if the fact be not averred in the bill. *Piatt v. Vattier*, 9 P. 405 . . . . xi. 404.

5. A party is not allowed to state one case by a bill, or answer, and make out a different one in proof; if he state merely a purchase, he cannot show a conveyance. *Boone v. Chiles*, 10 P. 177 . . . . xii. 63.

6. A bill must lay a sufficient foundation for a decree in conformity with its allegations. *Harding v. Handy*, 11 W. 103 . . . . vi. 529.

7. A statement in a bill of the facts which constitute incapacity to transact business, though not so satisfactory as a direct allegation of incapacity, is sufficient when no objection was taken by answer or demurrer. *Ib.*

8. Though a bill may be framed with a double aspect, the alternative case must be the foundation for the same relief. *Shields v. Barrow*, 17 H. 130 . . . . xxi. 409.

9. Where the equity of a bill rests upon the loss of a deed, an affidavit of its loss should be annexed to the bill; but the want of it is only cause of demurrer, and is waived by answering. *Findlay v. Hinde*, 1 P. 241 . . . . vii. 552.

10. After a final decree had been made, by consent, one of the parties joining his assignee in insolvency, and sundry of his creditors, alleged to be interested, brought a bill to set aside that decree for defect of jurisdiction and want of necessary parties. *Held*, 1. That this was an original and not a supplemental bill, or bill of revivor or review. 2. That if a bill of review, it was barred by the lapse of more than five years from the date of the decree. *Kennedy v. Georgia State Bank*, 8 H. 586 . . . . xvii. 714.

ACCOUNT, B. 1, 2; CONTRACT, F. 25, 26.

#### c. OF A SUPPLEMENTAL BILL.

*Supra*, B. b. 4.

1. If the original trustee is dead and another is appointed by the court, pending a suit to execute the trust, a supplemental bill should be filed, and a release required from the heir at law of the original trustee. *Greenleaf v. Queen*, 1 P. 138 . . . . vii. 499.

2. To obtain relief in equity on the basis of an agreement, made after the



commencement of the suit, the agreement must be brought before the court by a supplemental bill. *Hobson v. M'Arthur*, 16 P. 182....xiv. 241.

#### d. OF A CROSS-BILL.

1. A release by the complainant, executed pending a suit in equity, was filed in the cause, and the parties proceeded to take evidence in support and impeachment of it. *Held*, it was too late to object, in the appellate court, that a cross-bill should have been filed. *Kelsey v. Hobby*, 16 P. 269....xiv. 290.

2. A circuit court cannot force defendants in an equity suit to file a cross-bill, and bring in new parties, whom those defendants are, but the complainants are not, competent to sue in the courts of the United States. *Shields v. Barrow*, 17 H. 130....xxi. 409.

3. New parties cannot be introduced into a cause by a cross-bill. *Ib.*

APPEAL, A. 27; MISTAKE, 9.

#### e. OF A BILL OF REVIVOR.

DISCOVERY, 1; *Supra*, B. b. 1; PRACTICE, I. A. 8.

#### f. BILLS OF DISCOVERY, INTERPLEADER, AND REVIEW.

See THOSE TITLES.

#### g. DEMURRER.

1. An order that a party "appear and answer," before a day certain, is complied with by filing a demurrer. *New Jersey v. New York*, 6 P. 323....x. 134.

2. A demurrer to a bill by Rhode Island against Massachusetts, which showed that the complainant was led into a mistake in marking a boundary, by the agents of the defendants, was overruled. *Rhode Island v. Massachusetts*, 15 P. 233....xiv. 81.

3. Lapse of time sufficient to create a bar under the statute of limitations, unaccounted for by the bill, may be taken advantage of by demurrer. *Ib.*

JUDGMENTS, &c. E. 8.

#### h. PLEA, AND ANSWER IN SUPPORT OF PLEA.

1. A court of chancery exercises an equitable discretion concerning pleas, and, where they are not overruled, does not always allow them to be a bar. *Rhode Island v. Massachusetts*, 14 P. 210....xiii. 429.

2. A plea which contains, in substance, sufficient to bar the bill, if replied to, and found true in fact, is a bar, though defective in form. *Stead's Executors v. Course*, 4 C. 403....ii. 152.

3. A replication to a plea is an admission of the sufficiency of the plea, as much as if it had been set down for argument and allowed; and if proved, in point of fact, a dismissal of the bill is a matter of course. *Hughes v. Blake*, 6 W. 453....v. 122.

4. If a title paper is set out in the pleadings in equity, any defect apparent



on its face may be taken advantage of without averring it in pleading; but if the defect relied on depends on extraneous facts they must be averred, otherwise the court will not examine the question. *Crocket v. Lee*, 7 W. 522.... v. 310.

5. To test the sufficiency of an answer in support of a plea, every allegation in the bill, not denied by the answer, must be taken as true; and then, the plea having been set for hearing, the inquiry is, whether, upon that state of facts, the plea affords a bar. *Harpending v. Dutch Church*, 16 P. 455....xiv. 378

6. If the bill avers an express trust, and charges certain facts as evidence of the existence of that trust, and the defendant pleads the statute of limitations, he must support the plea by an answer denying those facts which are evidence of the trust. *Ib.*

7. In this case, it was held that certain pleas to a bill in equity were not a good bar; the grounds are not stated. *Milligan v. Milledge*, 3 C. 220....i. 562.

#### FOREIGN ATTACHMENT, 2.

##### i. ANSWER.

##### 1. EFFECT OF, AS EVIDENCE, WAIVER, OR OTHERWISE.

*Supra*, B. b. 4; *Infra*, C. 8.

1. The answer of one defendant to a bill in chancery, cannot be used as evidence against his co-defendant. *Leeds v. Marine Ins. Co. of Alexandria*, 2 W. 380....iv. 141.

2. And the answer of an agent is not evidence against his principal, nor are his admissions *in pais*, unless where they are a part of the *res gestæ*. *Ib.*

3. The answer of a defendant in chancery, who acted as agent for another defendant, denying the making of an agreement, is evidence for the principal. *Lenox v. Prout*, 3 W. 520....iv. 277.

3a. The answer of one defendant in chancery is not evidence against his co-defendant; nor is his deposition, although he had been discharged under the act of assembly of Rhode Island, of 1757, from all debts and contracts prior to the date of the discharge, and although the debt in suit was a debt contracted prior to such discharge, the debt having been contracted in a foreign country. *Clark's Executors v. Van Riemsdyk*, 9 C. 153....iii. 304.

4. An answer in chancery, although positive, and directly responsive to an allegation in the bill, may be outweighed by circumstances, especially if it be respecting a fact which, in the nature of things, cannot be within the personal knowledge of the defendant. *Ib.*

5. The answer of one defendant is evidence against another, who comes into the possession of the property in dispute by succession from the former, under such circumstances as to be affected by his equitable liabilities. *Osborn v. Bank of the United States*, 9 W. 738....vi. 251.

6. A decree cannot be pronounced, on the testimony of a single witness, unaccompanied by corroborating circumstances, against a positive denial, by the answer, of the equity of the bill, and this applies to an answer in support of a plea. *Hughes v. Blake*, 6 W. 453....v. 122.

7. The answer of a corporation, not under oath, and not made upon per-

sonal knowledge, may be controlled by one witness. *Union Bank of Georgetown v. Geary*, 5 P. 99 . . . ix. 241.

8. It is error to make a decree, upon admissions in an unsworn answer of a guardian *ad litem*. *Bank of the United States v. Ritchie*, 8 P. 128 . . . xi. 46.

9. A provision in a policy of insurance required the insured to give notice to the underwriter of any subsequent insurance, and have the same indorsed on the policy or otherwise acknowledged in writing. In an action at law, it was decided that the policy was void for want of such indorsement or acknowledgment. On this bill in equity, *Held*, 1. That the answer of the corporation, sworn to by its president, having explicitly denied the fact that notice of the subsequent insurance was given to the defendants, something more than one witness was required to overcome the answer, though the president was not in office when the alleged transactions took place. 2. That the proof adduced by the complainant was insufficient. *Carpenter v. Providence Washington Insurance Company*, 4 H. 185 . . . xvi. 77.

10. An answer, which admits the fact charged in a bill, that land was entered in the name of the respondent, but alleges it was paid for with the money of a third person, is not evidence of this last-named fact. *McCoy v. Rhodes*, 11 H. 131 . . . xviii. 575.

11. A disclaimer on the record, by a party whose name is stricken out to sustain the jurisdiction, will be noticed by the court so far as to learn from it what his interest is. *Vattier v. Hinde*, 7 P. 252 . . . x. 469.

12. If an answer set up the dismissal of a former bill for the same cause, the respondents must prove the allegation, by producing a copy of the record. *Bank of the United States v. Beverly*, 1 H. 134 . . . xiv. 533.

13. It is error, in the orphans' court for the county of Washington, in the District of Columbia, to decide a cause against the answer of a defendant, if the answer had not been denied by a replication, and there be no evidence in the record contradicting that answer. *Gettings v. Burch's Administratrix*, 9 C. 372 . . . iii. 388.

## 2. SUFFICIENCY AND EXCEPTIONS.

1. A party cannot protect himself from producing his ledger, by alleging that it contains entries in the same account prior to the time in question; though such prior entries are not to be inspected. *Harding v. Handy*, 11 W. 103, . . . vi. 529.

2. If a bill charges notice, the defendant must answer without a special interrogatory; but is not bound to answer an interrogatory as to a fact not stated in the bill. *Mechanics' Bank of Alexandria v. Lynn*, 1 P. 376 . . . vii. 633.

3. It is not matter of exception to an answer to a bill in equity, that it is silent concerning an immaterial fact; or one which, if admitted, could not tend to support the complainants' equity. *Hardeman v. Harris*, 7 H. 726 . . . xvii. 372.

## J. REPLICATION.

The court cannot act on a title stated only in a special replication, filed without leave of court. *Vattier v. Hinde*, 7 P. 252 . . . x. 469.

## C. PRACTICE.

1. GENERALLY. (*Infra*, C. 8.)

The practice of the circuit courts in equity has been prescribed by this court, and should be followed to the exclusion of the practice of the state courts. *McDonald v. Smalley*, 1 P. 620 . . . . vii. 732.

## 2. PROCESS AND SERVICE.

*Supra*, C. 1.

## 3. TIME FOR DOING ACTS.

*Infra*, C. 4, 9, 12.

## 4. ISSUES AND THEIR EFFECTS, AND EXCEPTIONS THERETO.

*Supra*, B. i. 1.

1. It is not improper to direct an issue on a question of fraud in fact, though it also involves matter in law. *McLaughlin v. Bank of Potomac*, 7 H. 220 . . . . xvii. 97.

2. If the finding of a jury on an issue in an equity cause is not consistent with an admission in the answer, it must be rejected; but both must stand, if reconcilable. *McFerran v. Taylor*, 3 C. 270 . . . . i. 577.

3. Upon the report of auditors it was competent for the court, on exceptions filed, to look into the evidence in the cause, and to direct an issue, which it might afterwards revoke; and if without an express revocation the court proceed to find the facts, this amounts to an implied revocation. *Field v. Holland*, 6 C. 8 . . . . ii. 303.

4. The degree of weakness of mind and the amount of consequent imposition, which will induce a court of equity to grant relief, are proper for the consideration of the court itself, and it is not necessary to send these inquiries to a jury. *Harding v. Handy*, 11 W. 103 . . . . vi. 529.

5. If exceptions are not taken on the trial of a feigned issue out of chancery, and passed on by the court sitting in equity, this court on appeal, cannot notice the points. *McLaughlin v. Bank of Potomac*, 7 H. 220 . . . . xvii. 97; *Brockett v. Brockett*, 3 H. 691 . . . . xv. 602.

## 5. PROOFS AND EVIDENCE.

*Supra*, B. i. 1, C. 4; *Infra*, C. 9; EVIDENCE, C. G. H. I.; INJUNCTION, C.

1. When a suit has been revived by a bill of revivor, the evidence which had been taken is used as if no abatement had occurred. *Vattier v. Hinde*, 7 P. 252 . . . . x. 469.

2. The reversal of a decree does not annul an agreement of the parties as to the admission of evidence. *Ib.*

## 6. DAMAGES.

*Supra*, A. 26.

## 7. AMENDMENTS.

Under the privilege of amending, the court should not allow a new and wholly different case to be made. *Shields v. Barrow*, 17 H. 130 . . . . xxi. 409.

## 8. HEARINGS ON BILL AND ANSWER, AND OTHERWISE.

Where a cause is set down for hearing on the bill, answer, and exhibits, without other pleadings, the whole of the answer must be considered as true. *Leeds v. Marine Insurance Company of Alexandria*, 2 W. 380 . . . . iv. 141.

9. REFERENCES, REPORTS, AND EXCEPTIONS. (*Supra*, C. 4.)

1. An order in an equity suit, made by consent, that two persons be appointed "auditors," to examine certain accounts, does not make them referees. *Field v. Holland*, 6 C. 8 . . . . ii. 303.

2. On a motion for an injunction, the court referred the case to a commissioner to take proofs upon questions stated, and to report on those questions, together with the proofs, allowing him to employ an expert to aid him and make a report to be annexed to his. Other questions were reserved until the report and a further hearing thereon. *Pennsylvania v. Wheeling and Belmont Bridge Company*, 9 H. 647 . . . . xviii. 291.

3. Time for taking testimony and reporting by the commissioner, extended till the further order of the court: and the authority to take testimony since the first day of the current term, confirmed; and the report having been returned, ordered, that the case be continued to the next term, with leave to each party to file exceptions to the report on or before a day fixed, the exceptions to stand for argument at a certain time thereafter. If no exceptions should be filed by either party, then the case to stand for final hearing on the day last mentioned. *Ib.* 11 H. 528 . . . . xviii. 703.

4. The 28th rule of practice in equity recognizes the propriety of examining witnesses before a master. *Story v. Livingston*, 13 P. 359 . . . . xiii. 196.

5. If a master's report is not excepted to, as required by the 73d chancery rule, no objection to any of its items can be taken in this court. *Brockett v. Brockett*, 3 H. 691 . . . . xv. 602.

6. Under a correct chancery practice, no exception to a master's report can be heard by the court which was not taken before the master, so that he may reconsider his decision, and which does not particularly specify the point or item excepted to. *Story v. Livingston*, 13 P. 359 . . . . xiii. 196.

7. If the master fails to report all the evidence upon the matter of an exception properly taken, the party excepting should apply to the court, specify what is omitted, verify his statement, and the court will require a further report. *Ib.*

8. It is not necessary to take exceptions to the report of auditors, if the

errors appear upon the face of the report. *Himely v. Rose*, 5 C. 313....ii. 277.

9. The court does not investigate items of account unless brought before it by exceptions to the report of a master, supported by the report of the evidence necessary to its decision. *Harding v. Handy*, 11 W. 103....vi. 529.

10. An auditor's report having been confirmed, becomes conclusive. *Bank of the United States v. Beverly*, 1 H. 134....xiv. 533.

11. The Kentucky statute of February 16, 1818, c. 453, did not require the court to approve a deed made pursuant to its decree. *Barr v. Gratz's Heirs*, 4 W. 213....iv. 376.

#### 10. REHEARINGS.

#### PRACTICE, I. D.

#### 11. RECEIVERS.

A receiver appointed by a state court in Mississippi, cannot be sued in that capacity in the circuit court of the United States for Louisiana. *Peale v. Phipps*, 14 H. 368....xx. 228.

#### 12. DECREES, AND HEREIN OF TAKING BILLS PRO CONFESSO.

1. A decree ordering a sale of land for the payment of debts of a deceased person, and a conveyance thereof, without report to and approval by the court, is erroneous. *Bank of the United States v. Ritchie*, 3 P. 128....xi. 46.

2. When a cause comes on for a hearing, on exceptions to a master's report, and for directions for a final decree, it is not irregular for the judge to reverse his decision, under which the reference was made, and dismiss the bill, if he thinks it ought to be dismissed. He is not obliged to enter a final decree which he believes erroneous. *Fourniquet v. Perkins*, 16 H. 82....xxi. 38.

3. Under the 20th rule for the regulation of the practice of the circuit courts in equity, the interlocutory order for taking a bill for confessed, was not required to be served before entering a final decree, and, consequently, the want of such service is not ground for a bill of review. *Bank of the United States v. White*, 8 P. 262....xi. 93.

### ERASURE AND INTERLINEATION.

BOND, A.; DEED, A.; EVIDENCE, G. 2.

### ERROR.

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A FORM OF THE WRIT, HOW, AND TO WHAT COURT ISSUED,  
SERVED, RETURNED, AND ENTERED.

PRACTICE, I. A.

1. A writ of error was dismissed, 1. Because it did not name all the parties to the judgment. 2. Because the bond was given to a person not a party to the record. 3. Because the citation was issued to a person who was not a party to the record. *Davenport v. Fletcher*, 16 H. 142....xxi. 57.

2. A writ of error which did not set out the names of all the parties to the judgment of the circuit court, was dismissed. *Smyth v. Strader*, 12 H. 327....xix. 160.

3. A writ of error naming the plaintiffs only as "the heirs of N. W." is bad. *Wilson's Heirs v. New York Life and Fire Insurance Company*, 12 P. 140....xii. 663.

4. A writ of error in the name of "A. B. and others" dismissed. *Deneale v. Stump's Executors*, 8 P. 526....xi. 202.

5. A writ of error cannot be allowed on the application of the friends of a party, without authority from himself. *Ex parte Dorr*, 3 H. 108....xv. 320.

6. The omission of the name of the district in the address of the writ is not material if the indorsement and attestation show the district. *Course v. Stead*, 4 D. 22....i. 319.

7. It is not necessary that the transcript of the record should contain the names of the jurors. *Owens v. Hanney*, 9 C. 180....iii. 321.

8. A case cannot be brought by a writ of error from a circuit court of the United States, upon a record containing only an agreed statement of facts, without any of the proceedings below except the judgment. *Keene v. Whittaker*, 13 P. 459....xiii. 248.

9. A writ of error may be directed to any court which has the custody of the record, and can certify it, though not the court which rendered the judgment, provided no difficulty exists respecting the execution of a mandate from this court. *Webster v. Reid*, 11 H. 437....xviii. 678.

10. Writs of error to remove causes to this court from inferior courts can regularly issue only from the clerk's office of this court. *West v. Barnes*, 2 D. 401....i. 2.

11. A writ of error must be returned and entered at the return term. If a

term intervene, the objection is fatal, and the error is not capable of being removed by any amendment. *Hamilton v. Moore*, 8 D. 371 . . . i. 265. *Blair v. Miller*, 4 D. 21 . . . i. 317.

11. a. Under the 25th section of the judiciary act, (1 Stats. at Large, 85,) the writ of error may be issued by the clerk of the circuit court in the State to whose court it is directed; and it need not purport on its face to be upon a final judgment of the highest court of the State in which a decision could be had. *Buel v. Van Ness*, 8 W. 312 . . . v. 428.

12. A writ of error issued in September, may bear *teste* of the February term preceding, and may be returnable to the next February term, notwithstanding the intervention of the August term between the *teste* and return of the writ. *Blackwell v. Patten*, 7 C. 277 . . . ii. 528.

13. Under the act of June 12, 1838, § 9, (5 Stats. at Large, 237,) the clerk of the superior court of the territory of Iowa could issue a writ of error to bring a record of that court hither, and the chief justice could sign the citation. *Sheppard v. Wilson*, 5 H. 210 . . . xvi. 362.

14. The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered. *Wood v. Lide*, 4 C. 180 . . . ii. 64.

15. If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. *Id.*

16. A return to a writ of error from this court to a state court, certified by the clerk of the court which pronounced the judgment, and to which the writ is addressed, and authenticated by the seal of the court, is in conformity to law, and brings the record regularly before this court. *Worcester v. Georgia*, 6 P. 515 . . . x. 214.

17. The 22d section of the judiciary act (1 Stats. at Large, 84,) requires a citation signed by a judge, and served at least thirty days before the return day of the writ of error. *Yeaton v. Lenox*, 7 P. 220 . . . x. 457.

18. The return of a copy of the record of a state court, duly certified by the clerk, and annexed to the writ of error, is a sufficient return. *Martin v. Hunter's Lessee*, 1 W. 304 . . . iii. 562.

19. A writ of error is not brought, until filed in the court to which it is addressed, and whose record is to be removed by it; and, therefore, though the writ is tested within five years, if it be not filed in the court which rendered the judgment, till after the expiration of that period, it is barred. *Brooks v. Norris* 11 H. 204 . . . xviii. 597.

## B. WHAT JUDGMENTS BEING FINAL, OR OTHERWISE, WILL OR WILL NOT SUPPORT THIS WRIT.

### JURISDICTION, A. d. 1.

1. This court can revise only those judgments which are final. *Mayberry v. Thompson*, 5 H. 121 . . . xvi. 330.

2. Where the record showed that, after the judgment of the circuit court for Harrison county (Kentucky) had been reversed by the court of appeals of that State, the case was remanded to the circuit court for further proceedings, the



judgment was therefore held not "final," and this court dismissed a writ of error to the court of appeals. *Winn's Heirs v. Jackson*, 12 W. 135 . . . . vii. 86.

3. An award of a writ of restitution in an action of ejectment in Kentucky, is not a final judgment in an action on which error lies. *Smith's Lessee v. Trabue's Heirs*, 9 P. 4 . . . . xi. 267.

4. An order of the circuit court quashing an inquisition of damages under the charter of the Chesapeake and Ohio Canal Company, is not a final judgment, and error does not lie. *Chesapeake and Ohio Canal Company v. Union Bank of Georgetown*, 8 P. 259 . . . . xi. 92.

5. Under the practice of the circuit court of the United States in Louisiana, an order, granting executory process to enforce a mortgage, without notice to the defendants, is only a judgment *nisi*, and not final, and a writ of error does not lie. *Levy v. Fitzpatrick*, 15 P. 167 . . . . xiv. 61.

6. A writ of error does not lie upon a judgment of a court of appeals, reversing a judgment of an inferior court, and remanding the case for further proceedings; it is not a final judgment. *Brown v. Union Bank of Florida*, 4 H. 465 . . . . xvi. 179.

7. A decree of a court of appeals in favor of a complainant, but remanding the case to an inferior court for further proceedings, is not final, and no writ of error lies to this court. *Pepper v. Dunlap*, 5 H. 51 . . . . xvi. 299.

8. An inferior court gave judgment on a demurrer against the defendant, in an information in the nature of a *quo warranto*; the defendant removed the case to the superior court, where the judgment was affirmed, and a *procedendo* awarded; *held*, that this was not a final judgment upon which a writ of error would lie to this court. *Miner's Bank of Dubuque v. United States*, 5 H. 218 . . . . xvi. 364.

9. An order of the circuit court for the District of Columbia, to certify to the orphans' court the finding of the jury upon an issue sent out of that court for trial, is not a final judgment upon which a writ of error lies to this court. *Van Ness v. Van Ness*, 6 H. 62 . . . . xvi. 600.

10. A judgment against two out of three joint defendants, all of whom were served, the third not being in any way disposed of, is irregular, not final, nor the foundation of a writ of error; and if one be brought, it must be dismissed, and the case remanded. *United States v. Girault*, 11 H. 22 . . . . xviii. 535.

11. Nothing having been done by the court below after a mandate but to tax the costs, and they being less than \$2,000, no writ of error lies. *Sizer v. Many*, 16 H. 98 . . . . xxi. 41.

12. Under the 17th section of the patent act of July 4, 1836, (5 Stats. at Large, 124,) a writ of error cannot be allowed merely to review a question of costs in a patent case. *Ib.*

## C. OF TAKING OR OMITTING A BOND TO PROSECUTE &c., AND HEREIN OF SUPERSEDEAS.

### JURISDICTION, A. d. 1.

1. The omission to take a bond, pursuant to the 22d section of the judiciary act, (1 Stats. at Large, 84,) does not avoid the writ of error. *Martin v. Hunter's Lessee*, 1 W. 304 . . . . iii. 562.

2. The bond required by the last clause of the 22d section of the judiciary act, (1 Stats. at Large, 84,) must be sufficient to secure the whole judgment, in case it should be affirmed, if the writ of error operate as a *supersedeas*. *Catlett v. Brodie*, 9 W. 553....vi. 180.

3. The judge signing the citation having omitted to take such a bond, the case was ordered by this court to stand dismissed, unless within thirty days from the rising of the court such a bond should be given, approved by any judge authorized to allow a writ of error and sign a citation on the judgment. *Ib.*

4. A second writ of error, sued out more than ten days after the entry of judgment, cannot operate as a *supersedeas*. *Hogan v. Ross*, 11 H. 294....xviii. 629.

*Supra*, A. 1.

#### D. PARTIES.

1. All the defendants in the court below not having joined in the writ of error it was held bad. These defects may be taken advantage of at any time before judgment. *Wilson's Heirs v. New York Life and Fire Insurance Company*, 12 P. 140....xii. 663.

2. A joint and several judgment having been rendered in Louisiana, the defendants severally sued out writs of error; a motion to dismiss the writs upon the ground that all the defendants ought to have joined in one writ, was overruled. *Cox v. United States*, 6 P. 172....x. 83.

3. Where there was a joint judgment against several defendants, and one only sues out the writ of error without joining the others, the writ was dismissed; but if the others refuse to join in it, *quære*, whether the plaintiff may not have summons and severance? *Williams v. Bank of the United States*, 11 W. 414....vi. 644.

4. The exercise of the discretion of the court below, in refusing leave to amend, is not examinable here, even if the decision was rested on a mistaken construction of a written contract. *United States v. Buford*, 3 P. 12....viii. 266.

*Supra*, A. 1-5.

#### E. AMOUNT IN DISPUTE. (JURISDICTION, A. d. 1.)

1. If more than the sum requisite for a writ of error is claimed in the *ad damnum*, and there is a general verdict for the defendant, the plaintiff may have a writ of error, though the bill of exceptions relates to items of less amount than such requisite sum. *United States v. M'Daniel*, 6 P. 634...x. 291.

2. The *ad damnum* in the writ being \$1,000, and the claim in the declaration \$1,241, on a writ of error by the plaintiff below, the *ad damnum* fixed the amount in dispute, and the court cannot take notice that by data in the declaration a computation may be made which would show less than \$1,000 to be due. *Scott v. Lunt's Administrator*, 6 P. 349....x. 142.

3. The judgment must be for more than \$2,000 to enable the defendant to have a writ of error. *Knapp v. Banks*, 2 H. 73 . . . . xv. 37.

4. In an action brought by the United States against a notary public, to recover damages laid at \$1,000, for having failed to give notice to the indorsers of a promissory note, for \$537.27, put into his hands for protest, there was a verdict and judgment for the sum of \$750.36, and upon this judgment, a writ of error was brought, and it was held that the matter in dispute was below the amount necessary to give jurisdiction to this court, and the writ of error was dismissed. *Winston v. United States*, 3 H. 771 . . . . xv. 638.

5. Under the 17th section of the patent act of July 4, 1836, (5 Stats. at Large, 124,) if a writ of error is allowed by the court in a case in which the amount in dispute does not exceed \$2,000, it must bring up the whole case for consideration, and cannot be restricted to certain questions selected by the court. *Hogg v. Emerson*, 6 H. 437 . . . . xvi. 780.

6. Where the action is to recover specific chattels, and their value is alleged in the declaration to exceed \$2,000, the defendant may have a writ of error, though it was part of the verdict that the chattels were of less value than \$2,000, provided the plaintiff released that part of the verdict, and it was not noticed in the judgment. *Bennett v. Butterworth*, 8 H. 124 . . . . xvii. 520.

7. The act of February 22, 1847, (9 Stats. at Large, 128,) gives an appeal, or writ of error, to this court, in cases originated in the territorial courts of Florida, &c.; without regard to the amount in dispute, or to the character of the proceeding, whether civil or criminal. *Forsyth v. United States*, 9 H. 571 . . . . xviii. 266.

#### REVENUE LAWS, B. 1.

### F. WHEN THIS WRIT IS OR IS NOT THE PROPER REMEDY, AND WHEN AND HOW WAIVED.

#### PRACTICE, II. G. 7.

1. A writ of error, in contradistinction to an appeal, is the mode prescribed by the judiciary act, to bring equity and admiralty cases to this court. *Wiscart v. Dauchy*, 3 D. 321 . . . . i. 240.

2. Whatever defects may exist in final process, error does not lie. *Amis v. Smith*, 16 P. 303 . . . . xiv. 311.

3. A refusal to quash final process is not a judgment, much less a final judgment, and error does not lie. *Ib.*

4. A writ of error is the proper remedy to revise an erroneous proceeding under a mandate of this court, in a proceeding at law. *Martin v. Hunter's Lessee*, 1 W. 304 . . . . iii. 562.

5. Under the judiciary act, (1 Stats. at Large, 73,) and the act of the 3d of March, 1803, (2 Stats. at Large, 244,) causes of admiralty and maritime jurisdiction, or in equity, cannot be removed, by writ of error, from the circuit court for reëxamination in the supreme court. *The San Pedro*, 2 W. 132 . . . . iv. 57.

6. The only appropriate mode of removing such causes, is by appeal: and the rules, regulations, and restrictions, contained in the 22d and 23d sections of the judiciary act, (1 Stats. at Large, 84,) respecting the time within which

a writ of error shall be brought, and in what instances it shall operate as *supersedeas*—the citation to the adverse party, the security to be given by the plaintiffs in error for prosecuting his suit, and the restrictions upon the appellate court as to reversals in certain enumerated cases, are applicable to appeals under the act of 1803, and are to be substantially observed; except that where the appeal is prayed at the same term when the decree or sentence is pronounced, a citation is not necessary. *Ib.*

7. A writ of error does not lie to quash an execution. *Evans v. Gee*, 14 P. 1 . . . .xiii. 304.

8. A writ of error will lie from this court upon the judgments of the circuit courts, awarding a peremptory *mandamus*, if the matter in controversy is of sufficient value. *The Columbian Insurance Company v. Wheelright*, 7 W. 534 . . . .v. 316.

9. Where the circuit court of the United States, for the eastern district of Pennsylvania, proceeding according to the practice in that State, adjudicated summarily on the conflicting claims of creditors, by reason of judgment liens, on property sold by the marshal, the proceeds whereof had been paid into court—*Held*, that neither upon a writ of error, nor by an appeal, could this court review such decision. *Bayard v. Lombard*, 9 H. 530 . . . .xviii. 252.

10. The last clause of the 17th section of the patent act of July 4, 1836, (5 Stats. at Large, 124,) allowing writs of error and appeals “in all other cases in which the court shall deem it reasonable to allow the same,” does not include a suit in equity to set aside an assignment of a patent right. *Wilson v. Sandford*, 10 H. 99 . . . .xviii. 312.

11. A judgment of a circuit court rendered on an agreed statement of facts may be reëxamined here by a writ of error. *Stimpson v. Baltimore and Susquehanna Railroad Company*, 10 H. 329 . . . .xviii. 412.

12. A writ of error, *coram vobis*, enables a court to correct errors which preceded its judgment. *Pickett's Heirs v. Legerwood*, 7 P. 144 . . . .x. 433.

13. It is now generally disused; a summary proceeding upon motion and affidavits, where they are necessary, being substituted. *Ib.*

14. A writ of error from this court does not lie to examine a judgment, rendered on a writ of error, *coram vobis*, where the error alleged was in granting an amendment. *Ib.*

15. A writ of error does not afford a remedy, if the jury depart from the instructions of the court. *Chesapeake and Ohio Canal Company v. Knapp*. 9 P. 541 . . . .xi. 476.

16. A motion for a new trial is not a waiver of a writ of error, and though there is a rule to that effect in some circuits, effect can be given to it only by requiring the party to waive his right on the record, before hearing his motion. *United States v. Hodge*, 6 H. 279 . . . .xvi. 681.

17. This court will not issue a writ of error and bring up a record of a court no longer in existence, and upon a reversal of whose judgment no mandate for further proceedings can go from this to any court. *Hunt v. Palao*, 4 H. 589 . . . .xvi. 208.

18. The jurisdiction of the circuit court in Louisiana, in cases at law and in equity, is distinct, and if a proceeding, which belongs to the latter jurisdiction, is brought up by a writ of error, the writ must be dismissed. *Mc Collum v. Eager*, 2 H. 61 . . . .xv. 32.

19. If the record of an action at law in Louisiana contains the evidence, but no bill of exceptions, and nothing raising any points of law distinct from the evidence, this court cannot revise the judgment on a writ of error. *Minor v. Tillotson*, 2 H. 892....xv. 149.

### MANDAMUS, C. 5.

### G. DAMAGES, &c.

#### DAMAGES; INTEREST, A.

### H. AMENDMENTS. (PRACTICE, I. A. 4.)

1. A writ of error may be amended by filling the blank left for the return day, there being enough on the writ to amend by. *Mossman v. Higginson*, 4 D. 12....i. 313.

2. A writ of error, tested in the vacation after the last term, is amendable. *Course v. Stead*, 4 D. 22....i. 319.

### I. WHAT MAY OR MAY NOT BE ASSIGNED FOR ERROR, AND WHAT WILL BE EXAMINED ON SUCH A WRIT.

#### EXCEPTIONS, A.; JUDGMENTS AND DECREES, D.; PRACTICE, II. G. 4, 7.

1. An objection that counsel fees were allowed in the court below as part of the damages, cannot be entertained unless the fact appears by the record. *Jennings v. Brig Perseverance*, 3 D. 836....i. 251.

2. A plaintiff may assign for error, want of jurisdiction of the court in which he instituted his suit. *Capron v. Van Noorden*, 2 C. 126....i. 459.

3. A writ of error will not lie on a judgment of nonsuit. *Evans v. Phillips*, 4 W. 73....iv. 347.

4. A refusal to grant a new trial affords no ground for a writ of error. *Barr v. Gratz's Heirs*, 4 W. 213....iv. 376.

5. It often happens that a right may be asserted in the course of a trial upon one of two grounds, both of which cannot exist; and though it is the duty of the court to guard against surprise in this respect, yet this is a matter of practice, and of discretion, and not ground for a writ of error. *Turner v. Yates*, 16 H. 14....xxi. 11.

6. This court will not revise the opinion of the circuit court, either granting or refusing a new trial. *Blunt's Lessee v. Smith*, 7 W. 248....v. 259.

7. The refusal of the court below to reinstate a cause which has been legally dismissed, is no ground for a writ of error. *Welch v. Mandeville*, 7 C. 192....ii. 493.

8. The refusal of the court below to continue a case, cannot be assigned for error. *Woods v. Young*, 4 C. 237....ii. 86. *Sims v. Hundley*, 6 H. 1....xvi. 580.

9. The refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as error. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 C. 206..ii. 373.

10. It is not a ground for a writ of error that the judge below refused to reinstate a cause after nonsuit. *United States v. Evans*, 5 C. 280 . . . ii. 262.

11. *Quære*. Whether the refusal of a court to compel a party to join in a demurrer to evidence, can in any case be assigned for error. *Young v. Black*, 7 C. 565 . . . ii. 669.

12. A writ of error to the circuit court for the District of Columbia, founded on a refusal by that court to quash a *ca. sa.*, issued upon a judgment, certified into that court by two justices of the peace, under an act of assembly of Maryland, will be quashed. *Mountz v. Hodgson*, 4 C. 324 . . . ii. 124.

12 *a*. The refusal of the circuit court to continue a cause cannot be assigned for error. *Sims v. Hundley*, 6 H. 1 . . . xvi. 580.

13. An exception having been taken to the refusal of the court below to continue the case, the judgment was affirmed with ten per cent. damages, on the ground that the writ of error was sued out merely for delay. *Barrow v. Hill*, 13 H. 54 . . . xix. 382.

14. An exception which became wholly immaterial in the progress of the trial, cannot be assigned as error. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 13 H. 307 . . . xix. 512.

15. If a party to a suit in Louisiana, has had the substantial benefit of a peremptory exception, in the progress of the cause, it is not error that when first tendered it was not allowed. *Phillips v. Preston*, 5 H. 278 . . . xvi. 396.

16. This court will not consider the question whether there was any evidence to be submitted to the jury, unless the opinion of the court below thereon was prayed for, and an exception regularly taken. *Garrard v. Reynolds's Lessee*, 4 H. 128 . . . xvi. 44.

17. If parties agree that the judges of the circuit court may draw inferences of fact not found by the jury in that court, and the judgment can be supported by a reasonable presumption that the judges found certain facts, it will not be reversed. *Prentice v. Zane's Administrator*, 8 H. 470 . . . xvii. 661.

18. It is not error for the court below to omit to give its opinion to the jury on a point, if not requested to do so. *Pennock v. Dialogue*, 2 P. 1 . . . viii. 1.

19. Unless the entire prayer, as made, ought to have been granted, its refusal is not error. *Columbian Insurance Company v. Lawrence*, 2 P. 25 . . . viii. 10.

20. A prayer which asks the court to declare the law, not on the facts but on the testimony, should be refused; the jury may not find the facts from the evidence. *Patterson v. Jenks*, 2 P. 216 . . . viii. 92.

21. A motion to quash an attachment, overruled by the court, cannot be reëxamined on a writ of error. *Toland v. Sprague*, 12 P. 300 . . . xii. 729.

22. Where the evidence conduces to prove a fact, it is competent in law to establish it, and upon a writ of error this court can revise the evidence only to ascertain whether it was thus competent in point of law. Whether the jury drew from it the correct inference in point of fact, cannot be here considered. *Hepburn v. Dubois*, 12 P. 345 . . . xii. 743.

23. Though evidence of title, when admitted and examined, might fail to show that the demandant, in a writ of right, has more mere right than the tenant, yet it is error to reject the evidence; until it is received, it cannot be compared with the evidence of the tenant, and it cannot be known, judicially, which has the better right. *Bradstreet v. Thomas*, 12 P. 174 . . . xii. 677.

24. The court is not bound to repeat to the jury the same substantial proposition of law in different forms ; it is sufficient if it be once laid down in an intelligible and unexceptionable manner. *Kelly v. Jackson*, 6 P. 622....x. 286.

25. If evidence be objected to generally, when admissible, for any purpose, it is not error to overrule the objection and admit the evidence ; the party objecting should, in such a case, pray an instruction limiting the effect of the evidence to the specific purpose for which it is admissible. *Ib.*

26. A court is not bound to give an instruction concerning an hypothetical state of facts, as to which there is no evidence before the jury. *Boardman v. Reed's Lessees*, 6 P. 328....x. 135.

27. It is not error for a judge to decline to advise a jury concerning the relative weight of different parts of the evidence. *Crane v. Morris's Lessees*, 6 P. 598....x. 274.

28. This court will not review the decision of a circuit court allowing a new count to be filed, in an action of ejectment, alleging a demise by a lessor not named in the old counts, nor its refusal to allow costs on the leave to amend. *Wright v. Hollingsworth's Lessee*, 1 P. 165....vii. 515.

29. A judgment on a bond will not be reversed, because the verdict is for the amount justly due, instead of the penalty, which is for a greater sum. *Huff v. Hutchinson*, 14 H. 586....xx. 854.

30. On a writ of error, the whole record is to be inspected ; and if a demurrer has been taken to evidence, not only this, but the sufficiency of the declaration must be examined. *Bank of the United States v. Smith*, 11 W. 171....vi. 547.

31. The court will not pronounce an opinion upon questions not raised on the record, though the counsel on both sides desire it. *Bradstreet v. Potter*, 16 P. 317....xiv. 316.

BAIL, B. 7 ; EJECTMENT, B. 2 ; JURY, A. 8 ; NEW TRIAL, 2.

## ERROR DEMONSTRATIONIS.

DEED F.

## ESCAPE.

The marshal is not liable for the escape of a debtor whom he has committed to a state jail. *Randolph v. Donaldson*, 9 C. 76....iii. 274.

## ESCHEAT.

ALIEN.

1. Land devised to an alien does not escheat until office found. *Taylor v. Benham*, 5 H. 233....xvi. 377.



2. The act of the State of Georgia, of December 15, 1810, concerning escheats, in speaking of leaving no heir, does not mean next of kin. *M'Learn v. M'Lellan*, 10 P. 625 . . . . xii. 278.

## ESCROW.

DEED, A.

## ESTOPPEL.

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### A. BY MATTER OF RECORD AND ACTS UNDER SEAL.

JUDGMENTS, &c. B. 3.

1. The recital of a lease in a deed of release estops all persons claiming under the parties to the deed of release, from denying the existence of the lease, or that possession under it which is necessary to give the release its intended operation. *Carver v. Jackson*, 4 P. 1 . . . . ix. 1.

2. A recital of a lease in a deed of release operates as an estoppel, which works on the interest in the land, and binds not only the parties, but privies in blood, in estate, and in law. *Crane v. Morris's Lessee*, 6 P. 598 . . . . x. 274.

3. If a deed of conveyance, expressly or by necessary implication, affirms that the grantor has and conveys a fee-simple in the land, his heirs are estopped from denying that he had that estate, and passed it by the deed to the grantee; and this may appear, in any part of the deed, or by other writings which are referred to therein. *Van Rensselaer v. Kearney*, 11 H. 297 . . . . xviii. 631.

4. The particular terms of a deed examined, and taken in connection with the writings referred to, held to amount to such an estoppel. *Ib.*

5. The mortgagor is estopped from denying his seisin in a suit to foreclose the mortgage. *Bush v. Marshall*, 6 H. 284 . . . . xvi. 684.

6. An obligee in a bond, which declares him to be a principal debtor, is estopped to plead that he was merely a surety. *Sprigg v. Bank of Mount Pleasant*, 12 P. 257 . . . . xii. 110.

BOND, F. 2; EVIDENCE, F. 10; RECITALS, 1; VERDICT, 7.

## B. BY RETURNS OF OFFICERS.

The return of the state surveyor, under his oath, cannot be invalidated, in an action on a covenant of seisin, by evidence tending to show that he did not in fact make the survey, which he returned. *Pollard v. Dwight*, 4 C. 421 . . . ii. 158.

## C. BY ACTS IN PAIS, AND HEREIN OF EQUITABLE ESTOPPELS.

## BILLS, &amp;c. G. 2.

1. The vendee is not estopped from disputing the title of his vendor. *Watkins v. Holman's Lessee*, 16 P. 25 . . . xiv. 174.

2. Though a tenant is estopped to deny the title of his landlord, yet if he disclaims holding under his landlord's title, gives notice that he holds adversely, and thereupon the landlord lies by until the statute of limitations has run, he cannot recover. *Willison v. Watkins*, 3 P. 43 . . . viii. 276.

3. Though a tenant in possession, who acquires a title adverse to that of his landlord, and gives his landlord notice that he denies his title and holds adversely to him, does thereby acquire a possession, so far adverse that the statute of limitations will then begin to run against the landlord, yet he cannot assert this adverse title by purchase, against his landlord, either at law or in equity, without first surrendering the possession. *Peyton v. Stith*, 5 P. 485 . . . ix. 436.

4. An agreement by parol, between two proprietors of adjoining lands, to employ a surveyor to run the dividing line between them, and that it should be thus ascertained and settled, which was executed, and the line accordingly run and marked on a plat by the surveyor, in their presence, as the boundary, held to be conclusive in an action of ejectment, after a correspondent possession of 20 years by the parties, and those claiming under them respectively. *Boyd's Lessee v. Graves*, 4 W. 513 . . . iv. 460.

5. Such an agreement is not within the statute of frauds, as being a contract for the sale of lands, or any interest in or concerning them. *Ib.*

6. If the debtor acts in selecting the appraisers on an order of seizure and sale in a proceeding for foreclosure, in the circuit court of the United States held in Louisiana, and in giving directions to the marshal concerning the mode of sale, and these facts are known to the purchaser when he buys, and pays for the property, the debtor is estopped from avoiding the sale by showing that the marshal had not taken the necessary steps to authorize him to sell. *Erwin v. Lowry*, 7 H. 172 . . . xvii. 76.

7. If a mortgage is duly recorded, it is not laches for the mortgagee to be silent concerning it; and he is not thereby precluded from asserting it against a purchaser without actual notice. *Dick v. Balch*, 8 P. 30 . . . xi. 12.

8. If, in an action of assumpsit against a corporation, the defendant insist that the writing, on which the action is founded, bears the corporate seal, and defeats the action upon the ground that it should have been an action of covenant, the defendant is estopped from denying, on the trial of an action of covenant, that the paper is the deed of the corporation. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 13 H. 307 . . . xix. 512.

9. By selling and conveying property to a third purchaser, the commissioners

under the act concerning the sale of lots in the city of Washington, precluded themselves from setting up the second sale ; and the second purchaser, by making this defence, affirmed the title of the third purchaser. *Oneale v. Thornton*, 6 C. 53....ii. 318.

ASSUMPSIT, B. 1 ; HUSBAND AND WIFE, C. 1.

#### D. ESTATES BY ESTOPPEL.

If one who has conveyed with warranty afterwards acquires the true title, it enures by way of estoppel to his grantee. *Bush v. Marshall*, 6 H. 284....xvi. 684.

#### E. WHEN AN ESTOPPEL DOES NOT ARISE.

1. If A sell land to B, but do not convey it, and B sells and conveys it to C, the latter is not estopped to deny A's title in an action by A's heirs to recover the land. *Blight's Lessee v. Rochester*, 7 W. 535....v. 316.

2. A tenant is estopped to deny his landlord's title, but if the plaintiff in ejectment himself deny the validity or operation of his contract, he cannot use it to create a tenancy, and thus estop the defendant. *Hughes v. Clarksville*, 6 P. 369....x. 148.

3. Heirs are not estopped by a warranty of their ancestor from claiming the property by purchase, but only by descent. *Oliver v. Piatt*, 8 H. 333...xv. 479.

#### F. HOW TAKEN ADVANTAGE OF.

If a party have not opportunity to show an estoppel by pleading, he may exhibit the matter thereof in evidence, and the court and jury are bound thereby. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 13 H. 307....xix. 512.

### EVIDENCE.

FOR EVIDENCE IN ADMIRALTY, *see* ADMIRALTY, C. b. 4, 5, D. ; FOR EVIDENCE IN EQUITY, *see* EQUITY, C. 5 ; FOR DEMURRER TO EVIDENCE, *see* PRACTICE, II G. 1 ; *see also* PATENTS, G. ; PUBLIC LANDS OF THE UNITED STATES, III D. b. ; RECEIVERS OF PUBLIC MONEYS, C. 1 ; REVENUE LAWS, F. 2.

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#### A. ADMISSIONS.

*Infra*, E. 1, H. 15.

B. BURDEN OF PROOF, PRESUMPTIONS, AND PRIMA FACIE EVIDENCE.

#### 1. BURDEN OF PROOF.

ADMIRALTY, A. 2; C. b. 5; REVENUE LAWS, A. 2.

1. Though the burden of proof is in many cases on the party who has peculiar means of knowledge, the rule is not universal, and the circumstances of this case afford an exception. *Greenleaf's Lessee v. Birth*, 6 P. 302....x. 126.

2. The plea of necessity, or distress, resorted to as an answer to a case which calls for a forfeiture, must be made out by the claimant. *The Josefa Segunda*, 5 W. 338....iv. 654.

3. To establish collateral heirship, it must be proved, not only that the ancestor is dead, but that he died without issue. The burden, as to both facts is on the claimant. *Chirac v. Reinecker*, 2 P. 618....viii. 230.

4. Where restitution of captured property is claimed, upon the ground that the force of the cruiser making the capture has been augmented within the United States, by enlisting men, the burden of proving such enlistment is thrown upon the claimant; that fact being proved by him, it is incumbent upon

the captors to show, that the persons so enlisted were subjects or citizens of the prince or state under whose flag the cruiser sails, transiently within the United States, in order to bring the case within the proviso of the 2d section of the act of June 5, 1794, (1 Stats. at Large, 383.) and of the act of the 20th April, 1818, (3 Stats. at Large, 447.) *The Estrella*, 4 W. 298....iv. 406.

ACCOUNT, A. 1; PLEADING, H. 3, 4.

## 2. PRESUMPTIONS.

FOR PRESUMPTIONS OF DEEDS, TITLES, &c., PARTLY OF LAW AND PARTLY OF FACT, see PRESUMPTIONS; see ALSO ADMIRALTY, C. b. 5; PAYMENT, B.; SPOILIATION.

1. The presumption is that all the partners have access to the partnership books, and know their contents; but this presumption may be rebutted. *Winship v. Bank of the United States*, 5 P. 529....ix. 457.

2. There is no presumption that the contents of a letter, written by one partner, in his own name, were known to his copartner, or assented to by him, though some of the contents of the letter related to the business of the firm. *Rogers v. Batchelor*, 12 P. 221....xii. 701.

3. An ouster by a mere intruder will not be presumed. *Society for the Propagation of the Gospel, &c. v. Pawlet*, 4 P. 480....ix. 160.

4. After the lapse of thirty years, the witnesses to a deed are presumed to be dead. *Winn v. Patterson*, 9 P. 663....xi. 516.

5. The courts of Louisiana presume that the subscribing witnesses to a written contract executed in another state, reside at the place where the contract was made, and the same rule should be applied in the circuit court held in Louisiana. *Wilcox v. Hunt*, 13 P. 378....xiii. 211.

6. If one part of an indenture is produced by one party to it, signed by the other party, the presumption is, that the other part, signed by himself, is in the hands of the other party. *Hallett v. Collins*, 10 H. 174....xviii. 349.

7. A paymaster gave a bond to secure the faithful performance of his duty within a certain district; he was a defaulter; the presumption is, that his defalcation arose out of transactions within his district, though it appears he made some payments out of the district. *Duncan's Heirs v. United States*, 7 P. 435....x. 535.

8. It is to be presumed that an invoice accompanied a consignment of merchandise to a foreign country. *Turner v. Yates*, 16 H. 14....xxi. 11.

## 3. PRIMA FACIE EVIDENCE.

1. *Prima facie* evidence of a fact is such as, in judgment of law, is sufficient to establish the fact; in the absence of all controlling or discrediting evidence, it is conclusive, and the jury are bound so to regard it. If they refuse to do so, the court should set aside their verdict. *Kelly v. Jackson*, 6 P. 622....x. 286.

2. When *prima facie* or presumptive proof has been made, its character, as such, ought not to be disregarded, and the court has not a right to direct the

jury to view it otherwise than in the aspect in which it is presented. *Crane v. Morris's Lessee*, 6 P. 598....x. 274.

3. *Primâ facie* evidence is such as in judgment of law is sufficient to establish a fact, and, if not rebutted, it remains sufficient. *United States v. Wiggins*, 14 P. 384....xiii. 488.

4. Where proofs are to be laid before a public officer, and he is to do an act on being satisfied of certain facts, his doing the act is *primâ facie* evidence that the proceeding was regular, and the sufficiency of the proofs cannot be controverted, or reëxamined before another tribunal, if the law has made him their proper judge. *Philadelphia and Trenton Railroad Company v. Stimpson*, 14 P. 448....xiii. 588.

5. If spirits are carried into the Indian country by a trader, and are there found among his goods, or any part of them, it is *primâ facie* evidence of his having violated the acts of congress, and throws the burden of proof upon the defendant. *American Fur Co. v. United States*, 2 P. 358....ii. 137.

ACCOUNT, A. 2; DEED, A. 7.

### C. DEPOSITIONS.

#### 1. TAKEN DE BENE ESSE. (*Infra*, C. 2.)

1. Under the 30th section of the judiciary act, a deposition is not admissible if the certificate does not clearly show the deposition was reduced to writing in the presence of the magistrate. *Bell v. Morrison*, 1 P. 351....vii. 612.

2. Cross-examining a witness is a waiver of irregularity in the time of taking the deposition. *Mechanics' Bank of Alexandria v. Seton*, 1 P. 299....vii. 585.

3. If the magistrate who takes a deposition, *de bene esse*, under the 30th section of the judiciary act of 1789, (1 Stats. at Large, 88,) does not certify any cause of taking, but appends the notice to the opposite party, which states that the witness is "about to depart the State," the deposition cannot be read. *Harris v. Wall*, 7 H. 698....xvii. 358.

4. The notice should, but in this case does not, show the cause of taking. *Ib.*

5. The fact that the attorney of the opposite party attended, but refused to take part in the proceedings, does not cure the defect in the certificate. *Ib.*

6. If parties agree a deposition should be read, this covers both what is incompetent and competent evidence contained in it. *Ib.*

7. Under the 30th section of the judiciary act of 1789, (1 Stats. at Large, 88,) a certificate that no notice was given to the adverse party or his attorney, as neither lived within one hundred miles, &c. is sufficient. If either was temporarily within that distance, so as to be served with notice, and this fact was known to the party taking the deposition, or the magistrate, it may be shown by parol, and the deposition would be excluded. *Dick v. Runnels*, 5 H. 7....xvi. 285.

8. The provision in the judiciary act of 1789, ch. 20, § 30, (1 Stats. at Large, 88,) as to taking depositions, *de bene esse*, does not apply to cases pending in this court, but only to cases in the district and circuit courts. *The Argo*, 2. W. 287....iv. 109.

9. "That the deponent is a seaman, on board a gunboat, in the harbor of Newport, and liable to be ordered to some other place, and not to be able to attend the trial," is not legal cause for taking his deposition *de bene esse*. *The Samuel*, 1 W. 9....iii. 447.

10. If it were, it must appear also that the witness could not attend at the trial. *Ib.*

11. It is a fatal objection to a deposition taken under the judiciary act of 1789, § 30, that it was opened out of court. *Beale v. Thompson*, 8 C. 70....iii. 29.

12. An *ex parte* deposition, under the act of congress, may be taken out of the district in which the trial is had. *Patapsco Insurance Company v. Southgate*, 5 P. 604....ix. 490.

13. The certificate of the magistrate that the witness resides more than one hundred miles from the place of trial, is *prima facie* evidence of that fact, and the *onus* of proving him to reside within that distance, at the time of trial, is upon the party objecting. *Ib.*

14. A judge of probate, in Mississippi, is "a judge of a county court," within the meaning of the 30th section of the judiciary act of 1789, (1 Stats. at Large, 88.) *Fowler v. Merrill*, 11 H. 375....xviii. 655.

15. Though under the law of Virginia, an attorney at law is not compellable to receive notice of the taking of a deposition, he may do so, and he may waive notice. *Buddicum v. Kirk*, 3 C. 293....i. 584.

16. Notice of taking a deposition on the 8th of August, and if not taken in one day, that the commissioners would adjourn from day to day until it should be finished, is not complied with, if the commissioners meet on the 8th and adjourn to the 10th, and then take the deposition. *Ib.*

17. An agreement by an attorney at law that the deposition might be taken whether he should attend or not, and his failure to make known any objection when he examined the deposition, and the death of the witness, amount to a waiver of the above objection. *Ib.*

18. The certificate and seal of the British minister resident at the court of Hanover, is not a proper authentication of the proceedings of an officer of that country in taking depositions. *Stein v. Bowman*, 13 P. 209....xiii. 126.

19. The only regular mode of taking depositions in a foreign country is under a commission. *Ib.*

20. The facts that a deponent went out of the State, and that an agent of the plaintiff has not heard of his return, though he has made inquiries, are not sufficient to entitle his deposition to be read. *Ib.*

## 2. TAKEN UNDER A DEDIMUS POTESTATEM OR COMMISSION.

### *Supra*, C. 1.

1. Depositions, taken according to the proviso in the 30th section of the judiciary act, (1 Stats. at Large, 88,) under a *dedimus potestatem*, "according to common usage, when it may be necessary to prevent a failure or delay of justice," are, under no circumstances, to be considered as taken *de bene esse*, whether the witnesses reside beyond the process of the court or within it; the



provisions of the act relative to depositions *de bene esse* being confined to those taken under the enacting part of the section. *Sergeant's Lessee v. Biddle*, 4 W. 508....iv. 456.

2. Where the circuit court issued a commission to take evidence in an admiralty cause pending in this court by appeal, and both parties joined in executing it, a proper order of the circuit court, or consent of the parties to dispense with the order, must be presumed. *Rich v. Lambert*, 12 H. 347.. xix. 171.

3. A commission to examine witnesses will not be awarded, although the opposing counsel assent, until the commissioners are named. *Vanstophorst v. Maryland*, 2 D. 401....i. 2.

4. If a commission to take evidence purport to be issued in a cause in which Richard M. Meade is plaintiff, when Richard W. Meade was plaintiff, the variance is not material. *Keene v. Meade*, 3 P. 1....viii. 261.

5. It is not necessary that depositions should be in the handwriting of any particular person, and therefore the return of commissioners need not show who wrote them. *Ib.*

6. If their certificate shows they employed a person as clerk, this is equivalent to certifying that they appointed him clerk. *Ib.*

7. It is not necessary that the form of the oath administered to a witness should be set out in the return. *Ib.*

8. The plaintiff may read depositions taken by the defendant. *Yeaton v. Fry*, 5 C. 335....ii. 285.

### 8. OTHER MATTERS.

1. A deposition read in evidence without objection, cannot be afterwards objected to and excluded for a cause apparent on the caption. *Evans v. Hetrich*, 7 W. 435....v. 300.

2. A deposition taken according to a practice of the state courts, but not under the laws of the United States, or pursuant to the rules of the circuit court is admissible in evidence only by consent. *Evans v. Eaton*, 7 W. 356....v. 283.

### D. HANDWRITING. (BILLS, &c. G. 1 ; *Supra*, C. 2.)

1. Due diligence to find a subscribing witness must be shown, before evidence of his handwriting is admitted. *Cooks v. Woodrow*, 5 C. 13....ii. 177.

2. Though, where it is not possible from lapse of time to offer evidence of handwriting, by a witness who had seen the party write, a comparison of handwriting of the document to be proved with other writings known to be his, may be heard, yet generally it is not to be allowed. *Strother v. Lucas*, 6 P. 763....x. 367.

## E. HEARSAY, ACTS, REPUTATION, RES GESTÆ, AND INTER ALIOS.

## 1. DECLARATIONS AND ACTS OF A PARTY OR OF THIRD PERSONS.

## EQUITY, B. i. 1.

1. Though the acts and declarations of a grantor after the conveyance are not evidence against the grantee, they are evidence to control the effect of the answer of the grantor. *Venable v. Bank of the United States*, 2 P. 107.... viii. 36.

2. Declarations of the deceased husband of one of the plaintiffs, claiming as heir of her father, that his wife's mother was not married to her father, are admissible. *Jewell's Lessee v. Jewell*, 1 H. 219....xiv. 578.

3. A publication, by the plaintiff's father, of a notice in a newspaper, to the effect that her mother was not his wife, made soon after they ceased to cohabit, is admissible as part of the *res gestæ* connected with the cohabitation and separation. *Ib.*

4. Whatever an agent does or says in reference to the business of his principal, in which he is at the time employed, and within the scope of his authority, is done or said by his principal, and may be proved in a criminal, as well as in a civil case, in like manner as if it applied personally to the principal. *American Fur Company v. United States*, 2 P. 358....viii. 137.

5. Declarations of an agent employed to lay out a town, and return a plan afterwards acted on by his principal, made while engaged in the work, to the effect that a certain strip of ground was reserved for a street, are admissible to prove a dedication of the land to that use. *Barclay v. Howell's Lessee*, 6 P. 498....x. 202.

6. Declarations of a deceased witness, as to particular facts attending a survey, are not admissible. *Ellicott v. Pearl*, 10 P. 412....xii. 179.

7. The rules concerning the admission of hearsay evidence examined. *Ib.*

8. Though the declaration of the patentee that, at some prior date, he had made the invention, is not admissible to prove that fact, yet his conversation, in which he described his invention, is evidence that he had then invented the thing he described. *Philadelphia and Trenton Railroad Company v. Stimpson*, 14 P. 448....xiii. 588.

9. Evidence that an officer who certified a copy, some years after, offered to or did, forge similar papers, is not admissible to impeach his certificate. *United States v. Wiggins*, 14 P. 334....xiii. 488.

10. The question being whether a deed of marriage settlement had been delivered, acts of the parents, who had a life-estate by the deed, inconsistent with the existence and operation of the deed, were held admissible against those to whom the deed limited remainders; though, if the deed was duly delivered, no acts of the tenants for life could affect the other estates. *Carver v. Jackson*, 4 P. 1....ix. 1.

11. But, in weighing the acts of parents respecting the estates of their children, the same inferences, as to strict legal authority, are not to be drawn as in case of strangers. *Ib.*

12. A deposition of the complainant's mother, under whom she claims title,

made in another proceeding, is evidence against the complainant. *Gaines v. Relf*, 13 H. 472....xix. 254.

13. Evidence that a corporation, through its counsel, treated a paper as its deed, in the course of a trial, is admissible, as against the corporation, to prove that the seal, attached to the paper, is the seal of the corporation. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 13 H. 307....xix. 512.

14. A letter from a husband to a wife, is evidence in a suit *inter alios* of the state of his feelings towards her when written, and also of his being at the place where it purports to have been written at the time of its date. *Gaines v. Relf*, 12 H. 472....xix. 254.

15. If one defendant produce in evidence a letter from his co-defendant to the plaintiff, the latter may give in evidence the written declarations of that co-defendant to discredit the letter. *Riggs v. Lindsay*, 7 C. 500....ii. 643.

16. A commercial correspondence, though between third persons, is often evidence of the nature of their transactions, and the relations they sustained to each other. *Turner v. Yates*, 16 H. 14....xxi. 11.

#### MARRIAGE, 3-6.

#### 2. REPUTATION.

1. Historical facts of general and public notoriety may be proved by reputation, and that reputation may be established by historical works, of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not presuppose better evidence in existence; and where, from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. *Morris v. Harmer's Heirs*, 7 P. 554....x. 558.

2. The work of a living author, who is within the reach of the process of the court, can hardly be deemed of this nature. He may be called as a witness. *Ib.*

3. The plat of the lots in the city of Cincinnati, made under the authority of the owner of the site of the city, and which had been generally recognized and used in the surveys of the lots laid down in the same, was properly admitted as evidence of reputation. *Ib.*

4. Ancient boundaries and landmarks may be proved by reputation. *Boardman v. Reed's Lessees*, 6 P. 328....x. 135.

5. Though declarations of aged and deceased members of a family, concerning its pedigree, are not admissible if made *post litem motam*, yet this rule applies only when the *lis mota* concerns the pedigree, not some other question involved in the title. *Elliot v. Piersol*, 1 P. 328....vii. 601.

6. Evidence, by hearsay and general reputation, is admissible only as to pedigree, but not to establish the freedom of the petitioner's ancestor, and thence to deduce his or her own. *Davis v. Wood*, 1 W. 6....iii. 446.

7. Hearsay evidence is incompetent to establish a specific fact, which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge. Claims to freedom in Maryland are not exempt from that general rule. *Mima Queen v. Hepburn*, 7 C. 290 ...ii. 585.

8. Testimony from a witness that he was at the place where the plaintiffs' ancestor had had his home, and there heard he was dead, is admissible to prove his death. *Scott's Lessee v. Ratliffe*, 5 P. 81....ix. 235.

9. Testimony by a witness that he had been in Germany last summer, and there heard from many old persons, of whom he inquired, that A was the brother of B, is not admissible to prove the relationship. It does not appear that the persons making the declarations were members of the family, or were dead, and they were made *post litem motam*. *Stein v. Bowman*, 13 P. 209....xiii. 126.

### 3. RES GESTÆ AND INTER ALIOS. (JUDGMENTS, &c. B. 3.)

1. Where two or more are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ* in its execution, may be given in evidence against the others. *American Fur Company v. United States*, 2 P. 358....viii. 137.

2. The question being, whether an invoice was made with intent to defraud, other invoices, of similar articles, imported by the claimant, some before and some after the importation in question, are admissible in evidence, if they tend to prove a fraudulent intent. *Wood v. United States*, 16 P. 342....xiv. 336.

3. Declarations by a patentee who had parted with his interest, under the patent, that he never completed his invention, are not evidence against one claiming under him. *Wilson v. Simpson*, 9 H. 109....xviii. 58.

4. Declarations of a master concerning the voyage, made while endeavoring to hire a mate, and as inducements to him to engage, are evidence against his employer. *United States v. Gooding*, 12 W. 460....vii. 281.

5. A general agent of a manufacturing establishment gave a certificate that a certain amount was due on settlement, from the firm whose agent he was; held to be admissible evidence against his principals, when connected with circumstances which tended to prove that the debt was contracted for materials used by him in the manufacture. *Barry v. Foyles*, 1 P. 311....vii. 592.

### F. PAROL AND EXTRINSIC EVIDENCE.

BILLS, &c. G. 4; CONSIDERATION; CONTRACT, E.; *Infra*, I. 1.

1. A contract in writing may be applied to its proper subject-matter, by oral evidence. *Bradley v. Washington, Alexandria, and Georgetown Steam Packet Company*, 13 P. 89....xiii. 54.

2. A written agreement "to hire the steamboat Franklin, until The Sydney is placed on the route," &c., may be explained by oral evidence of the circumstances under which the contract was made, with a view to show that the hirer was not bound, at all events, to retain the boat in his employment until The Sydney should be placed on the route. *Ib.*

2a. Parol evidence bearing on written papers, ought not to be admitted without the production of those papers, to enable the court and jury to see whether it will trench on the rule as to contradicting or varying written evidence.

*Philadelphia and Trenton Railroad Company v. Stimpson*, 14 P. 448 . . . . xiii 588.

3. Though written evidence of a payment exists, parol evidence is admissible. *Keene v. Meade*, 3 P. 1 . . . . viii. 261.

4. Parol evidence is admissible to prove that all the parties to a negotiable note agreed that payment should be demanded of the maker at a particular bank, the note being silent as to the place of payment or demand. *Brent's Executors v. Bank of the Metropolis*, 1 P. 89 . . . . vii. 472.

5. A letter of credit, addressed to John and Joseph Naylor & Co., will not support an action by John and Jeremiah Naylor & Co.; and the plaintiffs cannot be allowed to prove by parol, that the letter was intended to be addressed to their firm, and that the variance arose from mistake. *Grant v. Naylor*, 4 C. 224 . . . . ii. 84.

6. A letter having been written to the defendant by a third person, requesting the defendant to ship sugars to the plaintiff, and the defendant having added to the letter the word "agreed," and signed his name — *held*, that parol evidence was admissible to prove that the plaintiff agreed to advance moneys to the third person on the faith of the shipment; that this agreement and the letter and the assent of the defendant were parts of one transaction; and the written paper was made for the purpose of being delivered to the plaintiff, and was so delivered; and this being proved, it was further held that the contract of the defendant was not within the statute of frauds of New York. *D'Wolf v. Rabaud*, 1 P. 476 . . . . vii. 672.

7. Parol evidence that one set of written instructions superseded another, cannot be given. *Dunlop v. Munroe*, 7 C. 242 . . . . ii. 522.

8. The usage of trade may be proved by parol, although such usage originated in the law or edict of the government of the country. *Livingston v. Maryland Insurance Company*, 7 C. 506 . . . . ii. 648.

9. If foreign laws and regulations respecting trade be not proved to have been in writing as public edicts, they may be proved by parol. *Ib.* 6 C. 274 . . . . ii. 400.

10. Though technical estoppels do not exist in equity, yet there, no more than at law, can a party be allowed to vary the legal import of a written contract by parol evidence, nor can the court substitute one contract in place of another; and if one who signed a bond for the accommodation of another declares in terms, in the bond, that he is a principal debtor, a court of equity cannot treat him as a surety. *Sprigg v. Bank of Mount Pleasant*, 14 P. 201 . . . . xiii. 422.

11. Where the plaintiff showed by parol that two of the calls in his deed were not applicable to a lot of which he was in possession, unless another lot, of which the defendant was in possession, was also to be included, the defendant may give other parol evidence of the acts and declarations of the plaintiff, to show that the lot of the defendant was not included in the description contained in the plaintiff's deed. *Atkinson's Lessee v. Cummins*, 9 H. 479 . . . . xviii. 229.

12. Extraneous evidence is competent to show the existence and locality of objects called for, not to explain or construe the words of an entry. *Meredith v. Pickett*, 9 W. 573 . . . . vi. 191.

13. Parol evidence of declarations of the testator, made at the time he was engaged in making his will, as to his testamentary intentions, is not admissible to show that a devise to his children was not intended to include his daughters. *Weatherhead's Lessee v. Baskerville*, 11 H. 329 . . . xviii. 647.

14. Nor can the acquiescence of one of the daughters, who was under coverture, be relied on to show that the testator did not include her among his devisees, under the words "my children." *Ib.*

15. The board of commissioners of the navy hospital fund not being required by any act of congress to record its proceedings, oral evidence of its acts is admissible. *United States v. Fillebrown*, 7 P. 28 . . . x. '386.

16. Extraneous evidence that a clause in a written contract, providing for the forfeiture of a fixed sum if the work should not be completed by a certain day, was intended to liquidate the damages for such failure, is not admissible. *Van Buren v. Digges*, 11 H. 461 . . . xviii. 683.

17. Where a written promise of indemnity against certain debts, did not point out from what fund they must be paid to render the guarantor liable, it was proper to leave it to the jury to find, upon extrinsic evidence, what was the understanding of the parties in this respect. *Mauran v. Bullus*, 16 P. 528 . . . xiv. 410.

18. Though a guarantee cannot be added to by oral evidence, or by written evidence, not signed by the guarantor, or referred to and adopted by the letter of guarantee, and though its construction is matter of law, yet extrinsic evidence of accompanying circumstances is admissible, in order that the court may construe the writing with a knowledge of the facts to which it related. *Bell v. Bruen*, 1 H. 169 . . . xiv. 552.

19. The owner of a cotton mill applied for insurance, and represented in writing, among other things, that "no lamps were used in the picking-room." Subsequently, the property passed out of his hands, and, upon the application of the purchasers, another policy was issued, declaring the insurance to have been made "agreeably to the representations of J. S.," the former owner. This insurance was continued through several different policies, no new representation being made, until the destruction of the mill by fire, occasioned by a lamp in the picking-room. *Held*, that extraneous evidence was admissible to show what J. S.'s representation was, and that, as it was admitted to be material to the risk, had been adopted by the plaintiffs, and was not observed in practice, the plaintiffs could not recover. *Olark v. Manufacturers' Insurance Company*, 8 H. 235 . . . xvii. 569.

20. Where a privateer, cruising under a commission from the Republic of Venezuela, was lost, subsequent to a capture in question, the previous existence of the commission on board was allowed to be proved by parol evidence. *The Estrella*, 4 W. 298 . . . iv. 406.

21. Where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument, whether it was an official or a private act, parol evidence was admitted to show that it was an official act. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 W. 326 . . . iv. 648.

BILLS, &c. H. 3 ; CONTRACT, A. 9 ; CRIMINAL LAW, D. 3 ; ESTOPPEL, A. 6 ; GUARANTEE, B. 4.



G. PUBLIC ACTS, RECORDS, AND JUDICIAL DOCUMENTS.

1. EFFECT AS EVIDENCE AT COMMON LAW.

*Supra*, E. 1; JUDGMENTS, &c. B. 3; CONFLICT OF LAWS, H., K.

1. A volume of state papers published by authority of congress, is admissible evidence of the genuineness of the papers it contains. *Watkins v. Holman's Lessee*, 14 P. 25 . . . .xiv. 174.

2. Though a survey made by a public surveyor, is evidence of what he does officially, if he adds to it other matters, not strictly within the scope of his functions, they cannot be put in evidence. *Ellicott v. Pearl*, 10 P. 412 . . . .xii. 179.

3. A sentence of condemnation as prize, does not establish any particular fact, without which the sentence may have been rightly pronounced. *Maloy v. Shattuck*, 3 C. 458 . . . .i. 642.

4. Verdicts are evidence between parties and privies only; and a record, proving the ancestor's freedom to have been established in a suit against another party, to whom the ancestor was sold by the present defendant, is inadmissible evidence to prove the petitioner's freedom. *Davis v. Wood*, 1 W. 6 . . . .iii. 446.

5. A judgment recovered on an account against the principal, is evidence of the amount due from him, in an action against a guarantor of the account. *Drummond v. Prestman*, 12 W. 515 . . . .vii. 323.

6. A judgment in favor of heirs, against a purchaser of property of a deceased person from executors, is not evidence in an action by the purchaser against the executors, to recover back the purchase-money, except to show a recovery by paramount title. *Owings v. Hull*, 9 P. 607 . . . .xi. 497.

7. The record of a judgment in one State is conclusive evidence in another, although it appears that the suit in which it was rendered was commenced by an attachment of property, the defendant having afterwards appeared and taken defence. *Mayhew v. Thatcher*, 6 W. 129 . . . .v. 36.

8. Where a formal record is not required by law to be made up, those entries which are permitted to stand in its place, are admissible in evidence. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 18 H. 307 . . . .xix. 512.

9. The docket entry of an action is admissible evidence of its mere pendency in court. *Ib.*

10. Docket entries of another court are not admissible without laying some foundation, by showing why a copy of the record is not produced. *Ferguson v. Harwood*, 7 C. 408 . . . .ii. 596.

11. The record of a former recovery in ejectment is *prima facie* evidence of the title and possession of the plaintiff, as against one who, though not a nominal party on that record, really defended the action as landlord. *Chirac v. Reinecker*, 2 P. 613 . . . .viii. 230.

12. In an action of covenant on a warranty of title to land, the record of a recovery had in ejectment, against the defendant in the action of covenant, is admissible in evidence in favor of the plaintiff in that action, though he was examined as a witness for the plaintiff in ejectment. *Griffin v. Reynolds*, 17 H. 609 . . . .xxi. 725.



13. An exemplification of a public grant, under the great seal, is admissible in evidence, as record proof, of as high a nature as the original patent. *Patterson v. Winn*, 5 P. 288....ix. 311.

14. Where the complainant had put in secondary evidence that one D. had been convicted of bigamy by the ecclesiastical court in New Orleans, while under the dominion of Spain, and that, on search, the record thereof could not be found, the respondent may introduce a record of such prosecution in which D. was acquitted, coming from the custody of the proper officers, the signatures of the Spanish officers to the authentication of the record being proved, and it being shown that at the time in question those persons held those offices. *Gaines v. Relf*, 12 H. 472....xix. 254.

15. In a suit against an assignor of a sealed note, under the law of Kentucky, the record of the proceedings against the maker is admissible only to show the use of due diligence as against him. *Sebree v. Dorr*, 9 W. 558....vi. 183.

16. Upon a question whether a deed was fraudulent as against creditors, judgments recovered against the grantor are admissible to show his indebtedness, though the grantee was not a party to them; and if those records contain copies of the accounts constituting the causes of action for which the judgments were recovered, they may be examined by this court to see the dates when the debts were contracted, no specific objection to them having been taken at the trial. *Hinde's Lessee v. Longworth*, 11 W. 199....vi. 561.

17. When a matter of fact has been found by a master in chancery, and his report confirmed, it is conclusive evidence of that fact in another suit between the same parties. *Hopkins v. Lee*, 6 W. 109....v. 26.

18. A decree in chancery, under which title to land has been made, is admissible in evidence as one of the links in the chain of title, though *inter alios*. *Barr v. Gratz's Heirs*, 4 W. 213....iv. 376.

ASSUMPSIT, C. 11; DEED, D. 4.

## 2. EFFECT UNDER ACT OF CONGRESS.

### CONSTITUTIONAL LAW, E.

1. *Nil debet* is not a good plea to an action founded on a judgment of another State. *Mills v. Duryee*, 7 C. 481....ii. 631.

2. A judgment of a state court has the same credit, validity, and effect, in every other court within the United States, which it had in the State where it was rendered; and whatever pleas would be good to a suit thereon in such State, and none others, can be pleaded in any other court within the United States. *Hampton v. M'Connel*, 3 W. 284....iv. 207.

3. Under the act of May 26, 1790, (1 Stats. at Large, 122,) if a record have the attestation of the clerk and the seal of the court, together with the certificate of the presiding judge that the attestation is in due form, no evidence that the attestation is not in due form is admissible. *Ferguson v. Harwood*, 7 C. 408....ii. 596.

4. Under the act of May 26, 1790, (1 Stats. at Large, 122,) prescribing the manner in which the public acts, records, and judicial proceedings of the several States shall be authenticated, no other authentication of an act of the legisla-

ture is required, except the annexation of the seal of the State; it is presumed that the person who affixed the seal had competent authority to do so. *United States v. Amedy*, 11 W. 392....vi. 638.

5. Erasures and interlineations found in the exemplification, must be presumed to have been made before the seal was affixed. *Ib.*

6. The certificate of a person styling himself clerk of Baltimore county court, that the paper to which his certificate is annexed is a copy of a deed taken from the records of that court, unaccompanied by such a certificate as the act of congress requires, to show that the attestation is in due form, &c., does not make the copy evidence in the circuit court of the United States for Virginia. *Drummond's Administrators v. Magruder's Trustees*, 9 C. 122....iii. 290.

7. But as the objection was technical merely, the bill was not dismissed; the cause was remanded to the circuit court for further proceedings. *Ib.*

## H. DOCUMENTS NOT JUDICIAL, NOT PUBLIC ACTS OR RECORDS.

BILLS, &c. D. E.; *Supra*, B. 2; CONFLICT OF LAWS, H.; DEED, B. C. D.; NOTARY; RECEIVERS OF PUBLIC MONEY, C. 1; SHIPPING, B.

1. A bill of exchange, expressed to be for value received, is evidence of a valuable consideration, not only as against the parties, but third persons. *Mandeville v. Welch*, 5 W. 277....iv. 626.

2. The law of Louisiana requires a notary who protests a bill to make a record thereof in a book kept for the purpose; this is the original; and as the book cannot be required to be annexed to a deposition, a copy of that record so annexed may be read in evidence. *McAfee v. Doremus*, 5 H. 53....xvi. 300.

3. A protest by a notary is evidence of the dishonor of a bill of exchange, drawn in Kentucky on a person in New Orleans, in the State of Louisiana. *Townsley v. Sumrall*, 2 P. 170....viii. 68.

4. Though a demand of payment and notice of non-payment of a promissory note are not required by law to be by a notary, yet it being usual to employ one, an entry in his books of the facts of demand and notice may be given in evidence after his decease, to prove those facts. *Nicholls v. Webb*, 8 W. 326....v. 432.

5. Official copies of papers belonging to the titles of the parties, taken from the office where they are legally deposited, and regularly authenticated, are admissible in evidence. *Bunt's Lessee v. Smith*, 7 W. 248....v. 259.

6. Instruments under seal, purporting to be executed in the presence of a subscribing witness, must be proved by his testimony, or his absence be sufficiently accounted for. *Clarke's Lessee v. Courtney*, 5 P. 819....ix. 366.

7. An agreement to permit what was alleged to be the original paper to be taken away from the court, during the trial, and a copy left, does not dispense with an observance of the above rule. *Ib.*

8. It is not competent for a party to insist on the effect of one part of a document without giving the other party the benefit of the facts appearing in another part of the same document. *Greenleaf's Lessee v. Birth*, 5 P. 132....ix. 252.

9. A survey in conformity with the laws and customs of the place where it

is made, is a regular survey ; and if so made under the order of a court of admiralty, an exemplification of the proceedings of that court is admissible evidence of it. *Dorr v. Pacific Ins. Co.* 7 W. 581 . . . .v. 338.

10. A consular certificate is not admissible to prove the correctness of a translation. *Church v. Hubbard*, 2 C. 187 . . . .i. 470.

11. If only one plat in a book of surveys has been authenticated, a party cannot put another plat in evidence, merely because it is in the same book. *Chirac v. Reinecker*, 2 P. 613 . . . .viii. 280.

12. Under the law of New York, the oath of a subscribing witness before the proper magistrate, and the subsequent recording of the deed, afford *prima facie* evidence of its execution and delivery. *Carver v. Jackson*, 4 P. 1 . . . .ix. 1.

13. Private laws of a State, and proceedings by its legislature in respect to the sale of estates of deceased persons, must be proved as facts, and not by certificates of the secretary of state, certifying generally to the fact that such laws exist, and such proceedings have been had, without giving transcripts thereof. *Leland v. Wilkinson*, 6 P. 317 . . . .x. 133.

14. In general, a passport, granted by the secretary of state, is not evidence in a court of justice that the person to whom it was given was a citizen of the United States. *Urtetiqui v. D'Arbel*, 9 P. 692 . . . .xi. 532.

15. A record of a district court of the United States, containing an affidavit that the defendant is an alien, upon which affidavit the suit was removed to and acted on by the district court, is admissible, against the affiant, as evidence that he is not a citizen. *Ib.*

16. A deed more than thirty years old, and proved to have come from the right possession, is admissible in evidence without proof of execution. *Barr v. Gratz's Heirs*, 4 W. 213 . . . .iv. 376.

17. The books of a corporation are evidence of its acts and proceedings. *Owings v. Speed*, 5 W. 420 . . . .iv. 688.

18. Where a witness, a clerk to the plaintiff, swore that the several articles of merchandise contained in the account annexed to his deposition, were sold to the defendant by the plaintiff, and were charged in the plaintiff's daybook by the deponent and another person who is dead, and that the deponent delivered them ; and further swore, that he had referred to the original entries in the daybook ; *held*, that this was competent evidence to go to the jury to prove the sale and delivery of the goods. *M' Coul v. Lekamp's Administratrix*, 2 W. 111 . . . .iv. 49.

BILLS, &c. E. 1, 4 ; PROTEST, 1 ; PUBLIC LANDS OF STATES, B. 28-32.

## I. WITNESS.

### 1. COMPETENCY. (ADMIRALTY, C. b. 4.)

1. The decision in 6 P. 51, and 8 P. 12, that a party to a negotiable instrument cannot be a witness to invalidate it, affirmed. *Henderson v. Anderson*, 3 H. 73 . . . .xv. 293.

2. In an action by the indorsee of a note against an accommodation indorser,

the maker is not a competent witness to prove that the indorsee informed the indorser he would incur no responsibility by putting his name on the note. *Bank of the Metropolis v. Jones*, 8 P. 12....xi. 6.

3. An indorser is not a competent witness to prove that when a prior indorser put his name on the note he did so under a representation that sufficient bank stock, to secure payment of the note, had been pledged by the maker, and that his liability would be merely nominal. *Bank of the United States v. Dunn*, 6 P. 51....x. 20.

4. Nor can oral evidence, to that effect, be allowed to control the contract of the indorser. *Ib.*

5. Nor had the president and cashier of a branch of the Bank of the United States authority to bind that bank by such a representation. *Ib.*

6. The rule that a party to an instrument shall not be heard as a witness to impeach it, is confined to negotiable instruments. *United States v. Leffler*, 11 P. 86....xii. 348.

7. The grantor of a rent-charge, who had divested himself of all interest in the land, and who was released from all liability to costs, not being a party on the record, is a competent witness to prove usury. *Scott v. Lloyd*, 12 P. 145....xii. 666.

8. A party to a bill is incompetent to prove any fact which, taken in connection with other facts, cuts off a part of the nominal amount of such bill. *Saltmarsh v. Tuthill*, 18 H. 229....xix. 468.

9. A notary is a competent witness to prove his own acts in presenting a note for payment, &c., though liable to the plaintiff for negligence. *Cookendorfer v. Preston*, 4 H. 317....xvi. 124.

10. A party to a negotiable note, cannot impeach it by his testimony; *à fortiori*, if he be also a party to the record. *Smyth v. Strader*, 4 H. 404....xvi. 157.

11. A party plaintiff, who has become bankrupt, and received his discharge, is not a competent witness. 1. Because a party to the record; 2. Because interested to avoid a liability for costs, from which his certificate would not release him, and to increase the fund in which he has a resulting interest. *Bridges v. Armour*, 5 H. 91....xvi. 320.

12. A party in an action of assumpsit, as to whom the suit has abated, by reason of want of service of the writ, is a competent witness for his co-defendant, if released by him. *Le Roy v. Johnson*, 2 P. 186....viii. 77.

13. The principal obligor in a bond is not a competent witness for the surety, in an action upon the bond; the principal being liable to the surety for costs in case the judgment should be against him. *Riddle v. Moss*, 7 C. 206....ii. 513.

14. If a joint action be brought on a bond against a principal and his sureties, and they sever in their pleas, and the plaintiff afterwards takes a judgment by default against the principal, he is no longer a party to the record, and being released by his co-obligors, is a competent witness for them. *United States v. Leffler*, 11 P. 86....xii. 348.

15. A party cannot be admitted as a witness to items of account which from their nature admit of proof by other legal evidence. *Harding v. Handy*, 11 W. 103....vi. 529.

16. An attorney or counsel is not a competent witness to prove communica-

tions made to him by his client, in consequence of that relation. But he may be asked if the relation existed. *Chirac v. Reinecker*, 11 W. 280 . . . vi. 595.

17. A wife, after the death of her husband, cannot be allowed to prove that her husband had confessed to her that he had committed perjury in a deposition read in the cause. *Stein v. Bowman*, 13 P. 209 . . . xiii. 126.

18. A curator, party to the record, is not a competent witness, even if his liability to costs were set aside. *Ib.*

19. A naked trustee, having no interest in the trust-fund, is a competent witness in a suit concerning that fund. *Patton v. Taylor*, 7 H. 133 . . . xvii. 67.

20. Persons acting as agents of the government, are witnesses *ex necessitate* as to the facts attending the seizure, and they have no interest in the forfeiture; though interested in obtaining a certificate of probable cause, yet, where they act under a search warrant, this interest is too remote to disqualify them, and they are competent to testify on the trial of the merits, the question of probable cause being no part of the issue. *Taylor v. United States*, 3 H. 197 . . . xv. 382.

21. Other invoices, and the conduct of the importers as to other importations, may be admitted for the purpose of showing a scheme to defraud the United States. *Ib.*

22. In a suit between the original owner of a settlement right and one claiming the land under an assignee of that owner, such assignee is a competent witness to prove that he never owned the land and never assigned the warrant. *Wilson v. Speed*, 3 C. 283 . . . i. 582.

23. In an action at law for the violation of a patent for a new and useful invention, a person who has used the improvement claimed, is a competent witness for the defendant, though by the specification of defence matters are put in issue, which, if found specially for the defendant, would authorize the court to decree the patent void. *Evans v. Eaton*, 7 W. 356 . . . v. 283.

24. A person sued for an infringement of a patent is a competent witness for another person sued for infringing the same patent. *Evans v. Hettich*, 7 W. 458 . . . v. 300.

25. If a witness is sane when examined, evidence is not admissible to prove he is liable to fits of derangement. *Ib.*

26. A being sole owner of a bill of exchange indorses it in blank, and delivers it to B to deliver to C for collection, and when collected to place the amount to the credit of A and B, in account. C collects the amount, but refuses to place it to the credit of A and B, who settle their account with C and pay him the balance. A afterwards sues C for the amount received upon the bills; B is a competent witness for A. *Taber v. Perrott*, 9 C. 39 . . . iii. 247.

27. Though the 16th section of the act of April 30, 1790, (1 Stats. at Large, 116,) gives one half the fine imposed on one convicted of larceny, to the owner of the goods stolen, such owner is a competent witness in support of the prosecution. *United States v. Murphy*, 16 P. 203 . . . xiv. 252.

## 2. NUMBER.

## PERJURY; USAGE, 2.

## 3. IMPEACHMENT.

1. An immaterial contradiction of his testimony may leave a witness credible; yet if he is shown to have wilfully departed from the truth, the maxim, *falsus in uno falsus in omnibus*, must be applied. *The Santissima Trinidad and The St. Ander*, 7 W. 283....v. 268.

2. Contradictory statements by a witness cannot be given in evidence to impeach him, unless he has been asked whether he made such statements to the persons to whom it is attempted to be shown he did make them; and this rule applies where the witness testifies by deposition, and the contradiction was by a letter. *Conrad v. Griffey*, 16 H. 38....xxi. 23.

3. Where evidence of declarations of a witness has been given to impeach his testimony, in general, other declarations, made at different times, cannot be proved to corroborate him. *Ellicott v. Pearl*, 10 P. 412....xii. 179.

4. A party cannot discredit a witness whom he has called and examined, by showing his declarations, though the adverse party has also examined him. *Id.*

5. A witness having been impeached by evidence of declarations inconsistent with his testimony, cannot be corroborated by evidence of other declarations corresponding with his testimony. *Conrad v. Griffey*, 11 H. 480....xviii. 691.

## 4. DEATH.

To read the deposition of a deceased witness, taken in a former cause, it is not necessary the parties should be identical. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 13 H. 307....xix. 512.

## J. CIRCUMSTANTIAL EVIDENCE.

1. Circumstances will sometimes outweigh positive testimony. *Brig Struggle v. United States*, 9 C. 71....iii. 269.

2. Where the *res gestæ*, in a revenue cause, are incapable of explanation consistently with the innocence of the party, condemnation follows, although there be no positive testimony of the offence having been committed. Circumstances are sometimes more convicting than the most positive evidence. *The Robert Edwards*, 6 W. 187....v. 54.

3. Under the law of Maryland, the plaintiff has the right to prove his possession by a competent witness not present at the resurvey. *Greenleaf's Lessee v. Birth*, 5 P. 132....ix. 252.

4. Though a contract provided for a particular mode of testing the amount of fuel saved by means of an improvement in steam machinery, yet having given evidence of that test, it was competent to confirm it by similar experiments, and the experience of others on board other steamboats. *Washington, &c. Steam Packet Company v. Sickles*, 10 H. 419....xviii. 440.

5. Where two contracts were made, at different dates, each stipulating for certain notices, evidence that notices under the first were waived, before the second



was made, is not admissible to prove a waiver under the second. *United States v. Jones*, 8 P. 399 . . . . xi. 140.

### CAPTURE, I. 3.

### K. SECONDARY EVIDENCE. (BILLS, &c. F. 2.)

1. Principles upon which secondary evidence of written papers is admitted. *De Lane v. Moore*, 14 H. 253 . . . . xx. 163.

2. Though a refusal to produce books which are in a party's possession will warrant a jury in making all fair intendments in favor of the secondary evidence which is thus let in, yet this refusal is not an independent element, from which any thing can be inferred as to the point which was sought to be proved by the books, if produced. *Hanson v. Eustace's Lessee*, 2 H. 653 . . . . xv. 249.

3. A statute or rule of court dispensing with proof of signatures, unless their genuineness be denied under oath, does not change the law which requires original papers to be produced, or their absence to be accounted for. *Sebree v. Dorr*, 9 W. 558 . . . . vi. 183.

4. An affidavit, stating that it is the affiant's impression he destroyed a written paper, believing it would be of no further use, and that, if he did not thus destroy it, it is lost or mislaid, is sufficient, in the absence of all evidence of fraudulent suppression, to authorize the use of secondary evidence of its contents. *Riggs v. Tayloe*, 9 W. 483 . . . . vi. 144.

5. If the execution of an original paper be admitted, and it is in the defendant's possession, a copy, in the defendant's handwriting, may be used in evidence without notice to produce the original. *Carroll v. Peake*, 1 P. 18 . . . . vii. 428.

6. The affidavit of a party is competent evidence of the loss of a paper; it is not conclusive, but it is to be weighed by the court in connection with the circumstances. *Tayloe v. Riggs*, 1 P. 591 . . . . vii. 713.

7. When the contents of a written contract are to be proved by parol, vague or uncertain recollections are not sufficient; the substance of the agreement must be satisfactorily proved. *Id.*

8. Where an original deed should have been in the possession of the plaintiff's grantor, and he was applied to and furnished a bundle of papers which he said were all he had relating to the lands, and the deed in question was not found in the bundle, and there were no circumstances of suspicion,—*Held*, that it was not necessary to produce the grantor as a witness to prove the loss of the deed, that due diligence had been used to obtain it, and secondary evidence was admissible. *Minor v. Tillotson*, 7 P. 99 . . . . x. 407.

9. On trial of an indictment for violating the act of April 20, 1818, (3 Stats. at Large, 447,) by issuing a commission to cruise against a foreign prince at peace with the United States, secondary evidence of the existence and contents of the commission is admissible, according to the usual rules of evidence. *United States v. Reyburn*, 6 P. 352 . . . . x. 143.

10. Evidence having been given that the commission was on board of the vessel engaged in a cruise, and in the possession of J. C., her commander,—against whom several bench warrants having been issued, returns of *non est* were made,—*Held*, that secondary evidence was thus rendered competent. *Id.*



11. It was not necessary to apply to the foreign government for a copy of the commission. *Ib.*

12. The rule, that a copy of a copy is not admissible, applies properly to cases where the original is in existence, or where a record of it exists, and a copy of a copy of the record is offered. But where a witness has made two copies, and the original is lost, and the first copy was compared with the original, and the second was compared with the first copy, the rule does not apply. *Winn v. Patterson*, 9 P. 663....xi. 516.

13. Upon a question of pedigree, the contents of lost depositions stated in a bill of exceptions, taken between the same parties or their privies, on a former trial, may be read in evidence. *Chirac v. Reinecker*, 2 P. 618....viii. 230.

14. Evidence that a subscribing witness to a deed had been diligently inquired after, having gone to sea, and been absent for four years, without having been heard from, is sufficient to let in secondary proof of his handwriting. *Spring v. South Carolina Insurance Company*, 8 W. 268....v. 411.

15. Secondary evidence of instructions of the President to the secretary of the treasury admitted, after evidence tending to show the destruction of the written original instruction. *Williams v. United States*, 1 H. 290....xiv. 614.

16. Where the defendant was one of the disbursing officers of the treasury, and his books, papers, and vouchers were destroyed by fire, what secondary evidence was admissible to prove his disbursements. *United States v. Laub*, 12 P. 1....xii. 604.

17. When an act is done before a notary in Louisiana, the original remains with him, and a copy, by him certified, is admissible in evidence. *Owings v. Hull*, 9 P. 607....xi. 497.

18. The original letters testamentary remaining in the office of the register, a sworn copy is evidence. *Ib.*

DEED, B. 3, D. 21; *Supra*, H. 2; PLEADING, B. 11, 12.

#### L. IRRELEVANT AND REBUTTING EVIDENCE.

1. If irrelevant evidence is put in by the plaintiff, without objection, this will not authorize the defendant to offer irrelevant evidence, certainly not that which does not tend to disprove that of the plaintiff. *Stringer v. Young's Lessee*, 3 P. 320....viii. 430.

2. Evidence may be legal, as rebutting testimony, which would not be otherwise admissible. *Zacharie v. Franklin*, 10 P. 151....xii. 670.

3. It is not error to exclude legal evidence of an isolated fact from which a jury would not be warranted in drawing any inference pertinent to the issue. *Boardman v. Reed's Lessees*, 6 P. 328....x. 135.

*Supra*, J. 5.

#### M. WHAT JUDICIALLY NOTICED.

1. There are many facts, particularly geographical, the knowledge whereof is derivable from other sources than parol proof, which the court may judicially notice. *Peyroux v. Howard*, 7 P. 324....x. 506.

2. The circuit court sitting in Maryland is bound to take judicial notice of the laws of Louisiana. *Owings v. Hull*, 9 P. 607....xi. 497.

3. Spanish laws prevailing in Louisiana before its cession, and affecting titles to lands there, must be judicially noticed by the court. Their existence is not matter of fact to be tried by a jury. *United States v. Turner*, 11 H. 663.... xviii. 752.

## EXCEPTIONS, BILL OF.

A. WHAT IS A SUBJECT OF, 214.

B. WHEN AND HOW TAKEN, AND WHAT IT SHOULD CONTAIN, 215.

C. EFFECT OF, AND TO WHAT THE PARTY EXCEPTING WILL BE CONFINED, 216.

### A. WHAT IS A SUBJECT OF, (ERROR, I.)

1. A misdirection contained in the charge of the judge, is a subject of a bill of exceptions. *Smith v. Carrington*, 4 C. 62....ii. 19.

2. Though it has been held, (9 Pet. 182,) that the admission of evidence, where the judge tries both law and fact, is not a subject of a bill of exceptions, this is not true of the rejection of evidence. *Arthurs v. Hart*, 17 H. 6....xxi. 388.

3. In such a mode of trial, the counsel should present the legal propositions on which he relies, and the court should place on the record its rulings thereon. *Ib.*

4. If evidence was properly rejected, it is of no importance here, that an insufficient reason for rejecting it was given. *Silsby v. Foote*, 14 H. 218....xx. 148.

5. If, in the progress of the cause, the ruling excepted to become immaterial, and could produce no practical effect on the judgment, error cannot be assigned on it. *Greenleaf's Lessee v. Birth*, 5 P. 132....ix. 252.

6. The matter of an exception is not assignable as error, unless it worked some injury to the party who took the exception. *Ib.*

7. An error, which could not have injured the plaintiff in error, is not cause for reversing a judgment. *Blackwell v. Patton*, 7 C. 471....ii. 626.

8. It is not error to reject legal evidence of an irrelevant fact. *Turner v. Fendall*, 1 C. 116....i. 361.

9. It is not error to refuse to give an instruction upon an abstract question. *Hamilton v. Russel*, 1 C. 310....i. 415.

10. The court is bound to instruct the jury on a point of law relevant to the issue, if requested; but if the verdict conforms to what that instruction ought to have been, there is no error. *Douglass v. M'Allister*, 3 C. 298....i. 586.

11. Although a judge may refuse to declare the law to the jury on an hypothetical question not warranted by the testimony in the cause, yet if he proceeds to state the law, and states it erroneously, his opinion may be revised in the court above; and if it can have had any influence on the jury, their verdict will be set aside. *Etting v. Bank of the United States*, 11 W. 59....vi. 511.

12. Without some evidence upon a point, the court should not give an in-

struction concerning it. No merely speculative question should be decided. *Chirac v. Reinecker*, 2 P. 613....viii. 230.

13. If a case is not tried by a jury, the admission of evidence is not the subject of a bill of exceptions. *Field v. United States*, 9 P. 182....xi. 327.

14. Refusal of a new trial cannot be assigned as error. *Henderson v. Moore*, 5 C. 11....ii. 176. *Marine Insurance Company of Alexandria v. Young*, 5 C. 187....ii. 226.

15. If evidence is illegally admitted, this court cannot inquire into its weight or importance, but must reverse the judgment. *Smith v. Carrington*, 4 C. 62....ii. 19.

16. The court cannot be required to give to the jury an opinion involving matter of fact; and when such a request is made, is not bound to separate the law from the fact and instruct on the former, though it may be proper to do so. *Ib.*

17. The right to open and close is so far dependent on the discretion of the court below, that it is not the subject of a bill of exceptions. *Day v. Woodworth*, 13 H. 363....xix. 534.

## B. WHEN AND HOW TAKEN, AND WHAT IT SHOULD CONTAIN.

1. The charge, *in extenso*, should not be spread upon the record; its substance only is to be examined. *Evans v. Eaton*, 7 W. 856....v. 283.

2. The practice to spread the whole charge on the record and except to it is improper, and this court will not require a judge to sign such a bill of exceptions. *Ex parte Crane*, 5 P. 190....ix. 278.

3. The practice of bringing the whole charge of the court below before this court reprobated. *Carver v. Jackson*, 4 P. 1....ix. 1.

4. Though a bill of exceptions may be drawn up and signed after the trial, the exceptions must be taken at the trial, and, when signed, must purport on their face to have been so taken, and to have been then allowed and signed. *Walton v. United States*, 9 W. 651....vi. 220.

5. The law requires a bill of exceptions to be tendered at the trial. If it be drawn up afterwards, it should be done immediately, and during the term. To sign it after the expiration of the term is matter of consent or special order by the judge. *Ex parte Bradstreet*, 4 P. 102....ix. 20.

6. The record must show that an exception was taken at the stage of the trial when its cause arose, but the time and manner of placing the exception on the record may be regulated by the practice of the courts below. *Turner v. Yates*, 16 H. 14....xxi. 11.

7. A rule of the circuit court for Maryland, on this subject, held unobjectionable. *Ib.*

8. It must appear by the record that an exception to instructions was taken while the jury were at the bar, otherwise error cannot be assigned thereon. *Phelps v. Mayer*, 15 H. 160....xx. 452.

9. If a record declare that a bill of exceptions was taken on the trial of a case, this will control an erroneous date attached to the bill of exceptions, ac-

ording to which it was signed before the trial. *United States v. Wilkinson*, 12 H. 246 . . . . xix. 118.

10. It is unnecessary and irregular to set out the evidence in a bill of exceptions, when no exception was taken to its competency or sufficiency. *Pennock v. Dialogue*, 2 P. 1 . . . . viii. 1.

11. A bill of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court was prayed. *Vasse v. Smith*, 6 C. 226 . . . . ii. 379.

12. When the error assigned is the refusal of the court to give a particular direction to the jury, the direction must be so perfectly stated, as to be proper to be given as stated. *Violett v. Patton*, 5 C. 142 . . . . ii. 212.

13. Under an exception to the admission of evidence, it is incumbent on the plaintiffs in error to show the error satisfactorily, and if the exception is too vague to enable the court to see clearly that the testimony was illegal, the judgment will not be reversed. *Ventress v. Smith*, 10 P. 161 . . . . xii. 55.

14. It is the duty of the party excepting to evidence to point out the part excepted to, so that the attention of the court may be drawn to it; if the exception covers any admissible evidence, it is rightly overruled. *Moore v. Bank of the Metropolis*, 13 P. 802 . . . . xiii. 164.

15. A naked statement on the record that the reading of a deposition, or copy of a record, was objected to, without disclosing the nature or ground of the objection, is nugatory and wholly ineffectual in a court of error. *Camden v. Doremus*, 8 H. 515 . . . . xv. 535.

16. Under the territorial law of Iowa, a bill of exceptions taken after the trial was of no effect. *Sheppard v. Wilson*, 6 H. 260 . . . . xvi. 676.

### C. EFFECT OF, AND TO WHAT THE PARTY EXCEPTING WILL BE CONFINED.

1. If a prayer for instructions is not correct in the very terms in which it is drawn up, it is not error to refuse it; nor is the court bound to give instructions not rendered necessary by the evidence. *Brooks v. Marbury*, 11 W. 78 . . . . vi. 517.

2. A party should be confined, by a court of errors, to the specific objection to evidence taken at the trial. *Hinde's Lessee v. Longworth*, 11 W. 199 . . . . vi. 561.

3. The court is not bound to give a modified instruction, different in substance from what is requested; and if an instruction be not substantially correct, in reference to the evidence, in the terms in which it is prayed for, its refusal is not error. *Catts v. Phalen*, 2 H. 876 . . . . xv. 142.

4. The court is not bound to modify the instructions prayed for by counsel; if not correct in point of law as prayed, they may rightfully be rejected. *Buck v. Chesapeake Insurance Company*, 1 P. 151 . . . . vii. 508.

5. A court is not bound to do more than to respond to a motion to reject evidence in the terms in which it is made. If the motion be to reject all, and some is competent, it is not error to deny the motion. *Elliott v. Peirce's Lessee*, 1 P. 328 . . . . vii. 601.

6. If a bill of exceptions does not contain some paper offered in evidence and certified by the clerk below to have been accidentally lost, such lost paper will be presumed to contain what was necessary to support the judgment, if such a presumption is possible. *Carroll v. Peake*, 1 P. 18....vii. 428.

7. The bill of exceptions is conclusive, and the court cannot suspect there was evidence not shown by it. *Bingham v. Cabbot*, 3 D. 19....i. 76.

8. If inadmissible evidence of a material fact went to the jury, this court cannot look into the record to see if there was other legal evidence sufficient to justify the verdict; the judgment must be reversed and a new trial had. *Church v. Hubbart*, 2 C. 187....i. 470.

9. A party offering evidence for a particular purpose, must sustain his right to introduce it for that purpose; he cannot prevail in a court of errors by showing it was admissible for some other purpose. *Philadelphia and Trenton Railroad Company v. Stimpson*, 14 P. 448....xiii. 588.

10. Where the plaintiff in error prayed for an instruction that the statute of limitations did not bar his claim to recover the land sued for, which was refused, and exception taken, the plaintiff cannot, upon a writ of error, take the ground that, though it was a bar as against some of the defendants, it was not as against others; he was bound to discriminate between them at the trial. *Scott's Lessee v. Ratliffe*, 5 P. 81....ix. 235.

## EXCEPTIONS TO MASTER'S REPORT.

EQUITY, C. 9.

## EXCHANGE.

BILLS AND NOTES, G. 5.

Under the law of Louisiana, a notarial act, by which A agrees to convey to B a lot of land, in consideration of another lot, but which contains no conveyance of that other lot by B, is not an exchange. *Preston v. Keene*, 14 P. 138....xiii. 386.

## EXECUTIONS.

A. LAWS REGULATING EXECUTIONS IN THE COURTS OF THE UNITED STATES, 218.

B. OF THE ISSUING AND OF THE FORM AND TESTE OF EXECUTIONS, 218.

C. WHAT MAY BE LEVIED ON, 218.

D. OF THE DIFFERENT KINDS OF EXECUTIONS, AND THE LEVY THEREOF, AND THE EFFECTS OF THEIR LEVY, 219.

E. THE CONTROL OF A COURT OVER ITS EXECUTIONS, AND HEREIN OF AUDITA QUERELA AND SUPERSEDEAS, OTHER THAN UPON APPEAL AND ERROR, 220.

A. LAWS REGULATING EXECUTIONS IN THE COURTS OF THE UNITED STATES.

ADMIRALTY, C. a. c.; COURTS OF THE UNITED STATES, B, c.; INSOLVENT LAWS, B.; LAWS OF THE SEVERAL STATES, A.; PRACTICE, I. F.

B. OF THE ISSUING AND OF THE FORM AND TESTE OF EXECUTIONS.

VOID AND VOIDABLE.

1. An execution issued by a circuit court before the expiration of ten days after judgment, in a case open to a writ of error, is not void, and the marshal may justify under it; if voidable, the remedy is to apply to the court to set it aside. *Blaine v. The Charles Carter*, 4 C. 328 . . . ii. 125.

2. An execution against two defendants, issued and bearing *teste* after the death of one of them, is void, and a levy under it, upon land, gave no title to the purchaser thereof. *Erwin's Lessee v. Dundas*, 4 H. 58 . . . xvi. 21.

C. WHAT MAY BE LEVIED ON.

1. Money in the possession of the defendant may be taken in execution. *Turner v. Fendall*, 1 C. 116 . . . i. 361.

2. But the defendant is not the legal owner of the specific money made by the levy of an execution in his favor, which still remains in the hands of the sheriff, and such money cannot be levied on. *Ib.*

3. Under the 3d section of the act of Indiana, of February 4, 1841, the sheriff had not power to sell the fee on execution, without first offering the rents and profits for sale; and the purchaser was bound to take notice of his omission to do so. *Gantly's Lessee v. Ewing*, 3 H. 707 . . . xv. 608.

4. In Missouri, in 1836, lands of a deceased debtor could be sold on execution under a judgment against his executors. *Landes v. Brant*, 10 H. 348 . . . xviii. 418.

5. By the common law, which is the law of Maryland in this particular, an equity of redemption cannot be levied on by a *fieri facias*. *Van Ness v. Hyatt*, 18 P. 294 . . . xiii. 158.

6. The title acquired by a register's certificate, upon which a patent issues, is such an equitable title as was liable to be levied on by the law of Iowa. *Levi v. Thompson*, 4 H. 17 . . . xvi. 8.

ASSIGNMENT OF CHoses IN ACTION, A. 17.

## D. OF THE DIFFERENT KINDS OF EXECUTIONS AND THE LEVY THEREOF, AND THE EFFECTS OF THEIR LEVY.

BOND, C. 3; INSOLVENT LAW, B.; LIEN, C.

1. The marshal cannot receive depreciated currency in satisfaction of an execution; and if he returns that he has done so, the return may be quashed on motion, and an alias execution issued upon the judgment. *Griffin v. Thompson*, 2 H. 244....xv. 110.

2. If the creditor assents to the receipt by the marshal of depreciated bank-notes in satisfaction of an execution, he is bound thereby, and his assent may be presumed from lapse of time and other circumstances. *Buckhannon v. Tinsin*, 2 H. 258....xv. 112.

3. In a proceeding against a sheriff for not making the money out of goods returned as seized, he may show, in defence, that the goods did not belong to the debtor, but to a third person. *Chapman v. Smith*, 16 H. 114....xxi. 48.

4. Though after the reversal of an erroneous judgment, the defendant has a right to recover back what he may have paid, by a writ of restitution, or *scire facias*, or an action at law against the creditor, yet what is done under the execution pursuant to its precept, is valid, and, so far as strangers or third persons are concerned, is final. *Bank of the United States v. Bank of Washington*, 6 P. 8....x. 3.

5. Under the law of Tennessee, land having been attached on mesne process and judgment rendered by default, and the property condemned, and a *venditioni* issued, the division of the county, which left part of the land in the old, and part in the new county, did not prevent a sale of the whole, under the *venditioni*. *Tyrell's Heirs v. Rountree*, 7 P. 464....x. 545.

6. In Virginia, the right to take out an *elegit* is not suspended by suing out a writ of *fiери facias*, and, consequently, the lien of the judgment, which depends on the right to an *elegit*, continues during the proceedings on a *fiери facias*. *United States v. Morrison*, 4 P. 124....ix. 27.

7. The levy of a *ca. sa.*, in 1817, was a release of the judgment lien on lands of the debtor, by the law of Virginia; and in this case there was no escape, or death in custody, to revive the lien, nor was any execution lien created by the 10th section of the Virginia act of 1819, which applies only to levies commenced after the date of the act. *Snead v. M' Coull*, 12 H. 407....xix. 208.

8. Where a judgment lien existed on land at the time of its seizure and sale on the execution, and, under the law of Mississippi, an appraisement and suspension of proceedings took place, and the debtor died before the issue of a *venditioni exponas*, under which the land was sold to satisfy the execution. *Held*, 1. That the appraisement, &c., did not displace the lien. 2. That the sale upon the *venditioni exponas* was merely a continuation of the proceedings under the execution begun in his lifetime. 3. That his death, after the teste of the execution, and the seizure of the land thereon, did not render a *scire facias* necessary, and the levy and sale were regular and legal. *Taylor v. Doe*, 13 H. 287....xix. 502.

9. Under the law of Louisiana, the sale of property under execution, on a twelve months' credit, neither satisfies the judgment, nor novates the debt.



*Union Bank of Louisiana v. Stafford*, 12 H. 327 . . . .xix. 160. *New Orleans Canal and Banking Company v. Stafford*, 12 H. 843 . . . .xix. 168.

10. The debtor was committed to jail on a *ca. sa.*, admitted to the benefit of the prison rules on giving bond, with surety, pursuant to the act of congress, broke the rules, suffered a judgment to be recovered on his prison bond, on which *fi. fa.* being issued, was returned *nulla bona*. More than twelve months having expired, during which period only the debtor was entitled to the benefit of the rules, he was recommitted under the original *ca. sa.*; and thereupon, under the laws for the relief of insolvent debtors, he was discharged from imprisonment. *Held*, that the lien under the original judgment was valid and subsisting. *Taylos v. Thompson's Lessee*, 5 P. 358 . . . .ix. 379.

11. Under the laws of Maryland, it is the seizure and sale on a *fieri facias* which passes the title to land, and though some written evidence of the sale is necessary under the statute of frauds, yet a return on the execution, duly made at any time before the trial, is sufficient. *Remington v. Linthicum*, 14 P. 84 . . . .xiii. 361.

12. The marshal, having seized the land on a *fieri facias*, before its return day, may complete the levy afterwards; and he may make his return thereon at any time while he has the execution in his possession. *Ib.*

13. A debtor, arrested on a *ca. sa.* agreed with the creditor to make up an issue, upon the question whether he had the means of paying the debt, and to give security to abide the event; this he did, and was discharged from arrest, under the agreement which was "without prejudice to the plaintiff's rights, &c." *Held*, 1. That the discharge from the *ca. sa.* left nothing to the creditor save the agreement and its fruits; 2. That the saving "without prejudice, &c.," meant prejudice to the creditor's rights under the agreement, not to his rights as a judgment creditor to proceed against the person or property of the debtor under a new execution. 3. That by the discharge on the *ca. sa.* the judgment was extinguished. *Magniac v. Thompson*, 15 H. 281 . . . .xx. 515.

14. A sale, under a *fi. fa.*, duly issued, is legal as respects the purchaser, provided the writ be levied upon the property before the return day, although the sale be made after the return day. *Wheaton v. Sexton's Lessee*, 4 W. 503 . . . .iv. 454.

#### HABEAS CORPUS, 6; LIEN, C. 1.

### E. THE CONTROL OF A COURT OVER ITS EXECUTIONS, AND HEREIN OF AUDITA QUERELA AND SUPERSEDEAS, OTHER THAN UPON APPEAL AND ERROR.

#### APPEAL, C.; ERROR, C.

1. In modern times, courts of law exercise a summary jurisdiction, upon motion, over executions, and quash them, without putting a party to his writ of *audita querela*; but these motions are addressed to the sound discretion of the court, and their refusal is not a ground for a writ of error. *Boyle v. Zacharie*, 6 P. 648 . . . .x. 297.

2. At common law, a *supersedeas* must come before a levy, otherwise the sheriff may sell on a *venditioni*. *Ib.*

3. Whether a court will quash an execution, on account of proceedings

against the debtor as the garnishee of the creditor, is a question appealing to the discretion of the court below, and a court of errors cannot revise its decision thereon. *Early v. Rogers*, 16 H. 599 . . . . xxi. 814.

UNITED STATES, B. 5.

## EXECUTORS AND ADMINISTRATORS.

### CONFLICT OF LAWS, A.; WILL, A.

- A. SUITS BY AND AGAINST, 221.
- B. THEIR ACCOUNTS, 223.
- C. APPOINTMENT AND REMOVAL, AND THEIR EFFECTS; AND WHAT DOES OR DOES NOT VACATE THE OFFICE, 223.
- D. POWERS OF, AS TO SALE OF PROPERTY OF DECEASED, 224.
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### A. SUITS BY AND AGAINST.

EQUITY, B. b. 1; JUDGMENT, &c. B. 3; JURISDICTION, B. a. 4; PLEADING, I.

1. An administrator, who is indorsee of a note, may elect to sue thereon as administrator, or in his own right. *Matheson's Administrators v. Grant's Administrator*, 2 H. 268 . . . . xv. 114.

2. An administrator *ad colligendum*, under the laws of Mississippi, has power to sue in an action of *detinue*. *Ventress v. Smith*, 10 P. 161 . . . . xii. 55.

3. Where a party defendant died, and upon *scire facias*, a person appeared as administratrix, and on her death, and another *scire facias*, others appeared as executors of the defendant, and the record showed regular continuances from term to term. *Held*, there was no discontinuance. *Ib.*

4. Under the 11th section of the act of June 24, 1812, (2 Stats. at Large, 758,) an executor or administrator, appointed in any State, may maintain an action in the District of Columbia, to recover any money which the defendant has not a better title to, and he may give and receive discharges without suit, and may receive money of the government due to his intestate or due in his right. *Kane v. Paul*, 14 P. 83 . . . . xiii. 329.

5. An administrator, appointed in a State, is not liable to be sued in the District of Columbia, in his official capacity, for assets lawfully received by him under his letters of administration. *Vaughan v. Northup*, 15 P. 1 . . . . xiv. 1.

6. He is accountable to the proper tribunal of the government from whose laws he derived his authority, not to the tribunals of another State. *Ib.*

7. The act of June 24, 1812, § 11, (2 Stats. at Large, 758,) does not authorize a suit in the District of Columbia, against an executor or administrator appointed elsewhere. *Ib.*

8. An action at law will not lie in the circuit court of the United States for Louisiana, to recover a judgment *de bonis propriis* against an administrator, founded on a debt of the intestate, and alleging mal-administration, or what would amount, at the common law, to a *devastavit*. *Mc Gill v. Armour*, 11 H. 142....xviii. 577.

9. If it appear that an administrator has received assets, and no *devastavit* is averred, the decree should be against him in his representative character, to be levied out of such assets; and if they should not be found, then out of his proper goods. *Boyce's Executors v. Grundy*, 9 P. 275....xi. 356.

10. Where a conveyance of bank stock by a testator, in his lifetime, to a trustee, who was also his executor, had been declared by a court of equity to be invalid as against creditors, and the trustee had sold it, and out of the proceeds paid a debt of the testator: *Held*, that the payment might be considered as made by him as executor. *Yeaton v. Lynn*, 5 P. 224....ix. 305.

11. If executors are admitted to defend an action of ejectment, it must be because they are devisees; and a judgment against them for costs, *de bonis propriis*, is regular. *Bagnell v. Broderick*, 13 P. 486....xiii. 235.

12. An action for money received by the defendant, after the death of the testator, in his right, may be either in the name of the person who is executor, or in his name as executor. *Kane v. Paul*, 14 P. 38....xiii. 329.

13. Property or money, lawfully received by an executor or administrator, after the death of his testator or intestate, in virtue of his representative character, he is liable for in that character, or personally, at the election of the party who has a good title thereto. *De Valengin's Administrators v. Duffy*, 14 P. 282....xiii. 462.

14. By the 3d section of the act of assembly of Maryland of 1820, an administrator *de bonis non* is liable for assets which were converted into money by the administrator. *Ib.*

15. Upon the issue of *plene administravit*, the jury must find specially, the amount of assets in the hands of the executor, otherwise the court cannot render judgment upon the verdict. *Fairfax's Executor v. Fairfax*, 5 C. 19....ii. 179.

16. In Virginia, if the defendant die after interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded. *M'Knight v. Craig's Administrator*, 6 C. 183....ii. 359.

17. If a bill against an administrator and his surety charges the latter with being the fraudulent grantee of the intestate, and imputes waste to the administrator and collusion with the surety to secrete the personal estate, and prays for the subjection of the lands of the intestate, fraudulently conveyed to the surety in the lifetime of the intestate, it is sufficient. *McLaughlin v. Bank of Potomac*, 7 H. 220....xvii. 97.

18. Where an account was settled by an executor in 1818, and no fraud, but only a mistake in law in the rule for computing interest, was alleged, it was held that after the lapse of twenty years and the death of the executor, the settlement should not be opened. *Taylor v. Benham*, 5 H. 238....xvi. 377.

19. An action of debt will not lie against an administrator in one State, on a judgment recovered against a different administrator of the same intestate,

appointed under the authority of another State. *Stacy v. Thrasher*, 6 H. 44... xvi. 596.

20. If a plea of *plene administravit* be found against an administrator, he is liable only for what is in his hands unadministered. And the judgment should be *de bonis testatoris*. *Siglar v. Haywood*, 8 W. 675....v. 536.

21. Where an executor, pursuant to directions in the will, which the testator had power to give, sold land held by the testator in trust, and received the proceeds, he is accountable to the *cestuis que trust* in the State where he resides, though the will has not been proved there; and he cannot set up, that not having recorded or proved the will in the State where the land lay, he had no power to sell. *Taylor v. Benham*, 5 H. 233....xvi. 377.

22. On a bill against the trustees under a will, the court will not reëxamine the accounts of one of them as administrator *de bonis non*, nor of another as guardian. *Barney v. Saunders*, 16 H. 535....xxi. 288.

DEBT, C. 5-7; PLEADING, E. 4, L. 1.

### B. THEIR ACCOUNTS.

1. Though an administrator may retain assets in payment of his own debt, in preference to paying others in equal degree, he is not bound to do so; and if he have a lien on land to secure his debt, he may apply the personal assets to satisfy other creditors, and resort to his lien for his own payment. *Page v. Patton*, 5 P. 304....ix. 354.

2. If he sell land under such circumstances, by virtue of his lien. the proceeds, so far as necessary to pay his debt, do not come into his administration account. *Ib.*

3. A final account settled by an administrator with the orphans' court, is not conclusive evidence in his favor upon the issue of *devastavit vel non*. *Beatty v. Maryland*, 7 C. 281....ii. 529.

4. In Virginia, proceeds of personal property are legal, and of real property, equitable assets; and where the same person who was administrator was appointed by a court of equity a commissioner to sell the real property, and having proceeds of both species of property in his hands, was ordered by the court to make payments to a certain amount, without distinguishing between the different funds, it was held that, as against his sureties as administrator, he must be considered to have paid from both funds, in proportion to their amounts. *Backhouse v. Patton*, 5 P. 160....ix. 265.

### C. APPOINTMENT AND REMOVAL, AND THEIR EFFECTS; AND WHAT DOES OR DOES NOT VACATE THE OFFICE.

1. If an executor is removed from his trust, pending an action, his removal must be pleaded, otherwise it cannot be noticed by the court. *Yeaton v. Lynn*, 5 P. 224....ix. 305.

2. The removal of an executor from the State where he was appointed, does not disqualify him from continuing to execute his trust. *Edmonds v. Crenshaw*, 14 P. 166....xiii. 410.

3. The removal of a qualified executor from the State does not disqualify him nor enable the ordinary, in South Carolina, to appoint an administrator

If the ordinary appoint an administrator of an estate, of which there is an executor capable of acting, he exceeds his jurisdiction, and his act is void. *Griffith v. Frazier*, 8 C. 9....iii. 1.

4. An executor having been named in a will which was duly proved, and the executor qualified, in Maryland, letters of administration *de bonis non, cum testamento annexo*, granted in the District of Columbia, while the executor was living and competent, are merely void by the common law, which is not altered, in this particular, by statute. *Kane v. Paul*, 14 P. 88....xiii. 329.

#### BOND, F. 3.

### D. POWERS OF, AS TO SALE OF PROPERTY OF DECEASED.

#### POWER, A.

1. "Jurisdiction of all probate and testamentary matters" does not necessarily include granting licenses to administrators to sell lands for the payment of debts. *Bank of Hamilton v. Dudley's Lessee*, 2 P. 492....viii. 192.

2. The power of administrators to subject the lands of their intestates to the payment of debts, is not a vested interest; and the repeal of the law enabling a particular court to license sales for that purpose is valid, and the power of sale cannot be created after the repeal. *Ib.*

3. The power of an administrator to sell land for the payment of debts of the intestate, though not limited by any statute in Connecticut, at the time when this case arose, must be exercised within a reasonable time; and from analogy to the act limiting the right of entry into lands, fifteen years is held to be such reasonable time. *Ricard v. Williams*, 7 W. 59....v. 221.

4. An executor has no power to assign a military right, unless given to him by the will, and a purchaser of such a title has constructive notice of the will, which he was bound to see. *Brush v. Ware*, 15 P. 93....xiv. 34.

5. An order of the orphans' court, empowering an executor to sell the personal estate of a testator, does not enable him to sell slaves manumitted by the will, if the real estate is sufficient to pay the debts. *Fenwick v. Chapman*, 9 P. 461....xi. 428.

6. Under the laws of Alabama, an executor or administrator cannot sell personal property at private sale, unless so directed by the will of a testator, nor can they sell at all without an authority from the orphans' court. *Ventress v. Smith*, 10 P. 161....xii. 55.

7. Executors and administrators must pursue strictly their powers of sale, otherwise they do not divest the title, or conclude those interested. *Ib.*

8. A will of lands having been proved in New Hampshire, where the testator resided, the executrix sold lands in Rhode Island for payment of debts; and the legislature of the latter State, by a resolve, confirmed the sale. *Held*, that the sale was thus made valid. *Wilkinson v. Leland*, 2 P. 627....viii. 238.

### E. OTHER POWERS OF.

An executor may release the maker from all accountability to the estate by reason of indorsements of the testator, if he act in good faith and for a valuable consideration, and in the absence of evidence to the contrary both were pre-

sumed. *Columbia Insurance Company of Alexandria v. Lawrence*, 10 P. 507....xii. 216.

PARTNERSHIP, C. 4, 5.

F. LIABILITIES AND DUTIES. (JOINT TENANTS, &c.)

1. Each executor is liable only for his own acts, unless he knows and assents to the misapplication of assets by his co-executor. *Peter v. Beverly*, 10 P. 532....xii. 234.

2. Though each executor is responsible only for the assets he receives, he cannot discharge himself by simply paying over what he has received to his co-executor. *Edmonds v. Orenshaw*, 14 P. 166....xiii. 410.

3. In Virginia, it is not a breach of duty for an executor to fail to plead the statute of limitations. *West v. Smith*, 8 H. 402....xvii. 636.

4. Under the law of Alabama, an administrator *de bonis non* is responsible for assets in the hands of the deceased as executor. *Taylor v. Benham*, 5 H. 233....xvi. 377.

*Supra*, A. 5.

FACTOR.

AGENT.

1. A factor has not power to transfer the title of his principal to goods consigned to him for sale, in payment of a precedent debt due from himself; and a creditor who receives the goods under such an arrangement, as well as his vendee, though acting in good faith, and in ignorance of the fact that the goods did not belong to the factor, acquires no title, as against the principal. *Warner v. Martin*, 11 H. 209....xviii. 598.

2. A factor, who leaves the country, cannot delegate to his clerk the power to sell goods of his principal, no usage of the trade to that effect being shown. *Ib.*

FEIGNED SUIT.

The court heard a third person, not a party to the suit, upon a representation that the parties to it, having a common interest, adverse to his, had got up a feigned suit at law, to procure the opinion of the court upon questions affecting the petitioner, without making him a party; and being satisfied of the truth of the petitioner's allegations, the court dismissed the writ of error. *Lord v. Veazie*, 8 H. 251....xvii. 575.

FEE-SIMPLE.

DEED, I. 2.

## FIDEI COMMISSA.

CHARITY, A. 4.

## FIDUCIARY CAPACITY.

UNDUE INFLUENCE.

Bill to set aside a sale of real property, belonging to infant tenants in common, made under order of court to make a partition, upon the ground that there was constructive fraud by the purchasers. *Held*, that, though some of the defendants, who stood in fiduciary relations, appeared to have become interested in the property, it was not until after those relations had ceased; and the bill was dismissed. *Kearney v. Taylor*, 15 H. 494....xx. 607.

## FISHERIES.

The 7th section of the act of July 29, 1813, (3 Stats. at Large, 49,) requires an oath to the verity of the fishing agreement, as well as to the truth of the certificate of the times of sailing and returning. *United States v. Nickerson*, 17 H. 204....xxi. 458.

## FIXTURES.

A building, erected by a tenant with a view to carry on his business as a dairyman, and for a residence for his family and servants engaged in that business, the residence of the family there being merely to enable them to carry on the trade more beneficially, may be removed by him during the term. Its size or materials are not important. *Van Ness v. Pacard*, 2 P. 137...viii. 52.

## FOREIGN ATTACHMENT.

ATTACHMENT; JURISDICTION, F.

1. The service of a chancery attachment prevents the garnishee from legally parting with money in his hands. *Kennedy v. Brent*, 6 C. 187....ii. 361.

2. A foreign attachment in chancery is, as against the debtor, an action at law, and he may plead the statute of limitations without the support of an answer. *Wilson v. Koontz*, 7 C. 202....ii. 512.

3. By the law of Massachusetts, a garnishee who has converted into money



property assigned to him by the principal debtor, and who has just claims against that debtor exceeding in amount such proceeds, cannot be charged as garnishee, though the assignment were constructively fraudulent, as against creditors. *Beach v. Viles*, 2 P. 675 . . . .viii. 252.

4. If a party who sues out a process of attachment consents that the garnishee may sell the merchandise in his hands, he becomes responsible to the debtor for any loss arising therefrom. *Brashear v. West*, 7 P. 608 . . . .x. 589.

5. A foreign attachment in a state court commenced after the institution of an action to recover the debt in a court of the United States, cannot be pleaded as a defence to the latter, either in part or in whole. *Wallace v. M'Connell*, 13 P. 136 . . . .xiii. 91.

6. The assignee of a *chose in action*, who is a creditor and not a debtor of the principal defendant in a process of garnishment, and who took the assignment to secure his claim, is not liable to that process under the law of Maryland, and may truly answer that he had not in his hands any thing belonging to the principal debtor. *Deacon v. Oliver*, 14 H. 610 . . . .xx. 365.

LAWS OF THE SEVERAL STATES, B. 7; STATE COURTS AND MAGISTRATES, A. 3; VENDOR AND PURCHASER, C. 2.

## FORFEITURE.

ADMIRALTY, B. 1, 3; PENALTIES AND FORFEITURES; REVENUE LAWS, F. 1.

1. By the general maritime law, as well as by the legislation of particular countries, vessels are made responsible for the unlawful acts of their masters and crews, and this extends even to forfeitures, by positive law. *Harmony v. United States*, 2 H. 210 . . . .xv. 91.

2. Under the 4th section of the act of March 3, 1819, (3 Stats. at Large, 513,) any piratical aggression subjects the vessel to forfeiture, though not made *causa lucri*, and though the owners were entirely innocent, and the vessel was armed for a lawful purpose, and sailed on a lawful voyage. *Ib.*

3. Under the act of 1819, the cargo, belonging to an innocent owner, is not forfeited; and this act shows that the policy of this country does not require such a forfeiture under the law of nations. *Ib.*

## FORGERY AND FALSE PRETENCES.

CRIMINAL LAW, B; CRIMINAL PROCEDURE, A. 3, 4.

## FORMER ACQUITTAL OR CONVICTION.

A plea that the same bank-bill which the defendant is indicted for passing

was given in evidence under a former indictment, and the defendant was then acquitted, is bad; it does not show the former indictment was for the same offence. *United States v. Randenbush*, 8 P. 288....xi. 105.

## FORTHCOMING BOND.

BOND, E; JUDGMENTS, &c. B. 1.

## FRAUD.

A. WHAT IS OR NOT, AND SOME GENERAL PRINCIPLES IN REFERENCE THERETO. 228.

B. REMEDY AT LAW, 229.

1. BY RESCISSION OF CONTRACT OR OTHERWISE.

2. BY ACTION.

C. REMEDY IN EQUITY, 229.

D. FRAUDULENT REPRESENTATIONS AS TO CREDIT, 230.

A. WHAT IS OR NOT, AND SOME GENERAL PRINCIPLES IN REFERENCE THERETO.

COMPOSITION; UNDUE INFLUENCE.

1. Fraud consists in intention; and that intention is a fact which must be averred in a plea of fraud. *Moss v. Riddle*, 5 C. 351....ii. 290.

2. Mere inadequacy of consideration, unless extremely gross, does not, *per se*, prove fraud or mistake. *Eyre v. Potter*, 15 H. 42....xx. 893.

3. To set aside a contract on the ground of misrepresentation, it must be of something material, constituting some motive to the contract, something in regard to which reliance is placed by one party in the other, and by which he is actually misled; not a matter of opinion, merely, equally open to the inquiry and examination of both parties. *Smith v. Richards*, 13 P. 26....xiii. 18.

4. The vendee is not bound by law to communicate to the vendor intelligence of peace having been declared between this country and Great Britain, though within his exclusive knowledge at the time of the sale, and though it might influence the price; but the question whether any imposition was practised, should be left to the jury. *Laidlaw v. Organ*, 2 W. 178....iv. 72.

5. A release made by heirs, just come of age, out of possession, ignorant of the value of the land, and of the nature of their title, obtained by one in possession, well acquainted with the facts, who had designedly obscured the title, and who paid only an inadequate consideration, was set aside, as constructively fraudulent. *Hallett v. Collins*, 10 H. 174....xviii. 349.

6. A bill in equity, which states as the complainant's title, that he purchased,

under regular proceedings, and at an open and fair execution sale, a debt of \$260,000, for \$600, is not bad on demurrer. *Erwin v. Parham*, 12 H. 197 ....xix. 97.

7. A question upon the evidence, whether certain deeds were obtained by fraud. *Barribeau v. Brant*, 17 H. 43 ....xxi. 854.

8. A fraud which could have no effect on the rights or duties of obligors in a bond, does not avoid it. *United States v. Boyd*, 5 H. 29 ....xvi. 290.

9. An act which is merely colorable, and done in fraud of a law, cannot enable a party to claim its protection. *Lee v. Lee*, 8 P. 44 ....xi. 20.

10. Fraud, practised on others, can have no influence, except as evidence of a connected scheme of fraud, and then it must appear the complainant was embraced in and suffered by it. *Clarke v. White*, 12 P. 178 ....xii. 680.

11. Reducing an agreement to writing, does not prevent the vendee from showing it was obtained by fraudulent misrepresentations. *Boyce's Executors v. Grundy*, 8 P. 210 ....viii. 877.

12. When a party discovers a fraud, he is bound to be prompt in communicating the discovery, and consistent in the use he proposes to make of it. *Ib.*

#### AUCTION, RELEASE, 1, 3.

### B. REMEDY AT LAW.

#### 1. BY RESCISSION OF CONTRACT OR OTHERWISE.

CONTRACT, G.; JUDGMENTS, &c. G.; VENDOR AND PURCHASER, A.

#### 2. BY ACTION.

1. If a party make a false representation that he is a creditor of the government, and thereby obtains from the commissioner a certificate of stock in the public funds, the United States may affirm the transaction, and in an action on the case for the fraud, recover as damages the value of the certificate. *Fenimore v. United States*, 3 D. 357 ....i. 256.

2. If interest has been received, it may be recovered back under a count for money had and received, and by consent this last count may be joined with counts for the fraud. *Ib.*

### C. REMEDY IN EQUITY.

EQUITY, C. 4, 5; SPECIFIC PERFORMANCE AND RESCISSION.

The complainants alleged that an owner of lands had a disposition to sell to them for less than to others, and that they had been fraudulently deprived of the benefit of this good-will for less than its value, by the defendants; *held*, that to obtain relief the complainants must not only prove unfair practice, but that they had been deprived of something for less than its true value;—bill dismissed. *Garrow v. Davis*, 15 H. 272 ....xx. 510.

EXECUTORS, &c. A. 17.

## D. FRAUDULENT REPRESENTATIONS AS TO CREDIT.

1. The gist of an action for a false representation concerning the credit of another, is the fraud of the defendant, and damage thereby done to the plaintiff; and for any honest statement, however ill-founded, this action will not lie *Lord v. Goddard*, 13 H. 198....xix. 461.

2. If a representation concerning the credit of another is honestly made, its actual falsehood does not render the person making it liable to an action. *Russell v. Clark's Executors*, 7 C. 69....ii. 459.

JURY, A. 11.

## FRAUDS AS TO CREDITORS.

## ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

A. VOLUNTARY CONVEYANCES AND CONSIDERATION, AND EVIDENCE THEREOF, 230.

B. POSSESSION AFTER CONVEYANCE, 231.

C. EXISTING AND SUBSEQUENT CREDITORS, AND HEREIN WHO ARE SUCH, 232.

D. BADGES OR PRESUMPTIONS OF FRAUD, 232.

E. WHAT CONVEYANCES ARE OR ARE NOT DEEMED FRAUDULENT PER SE, 232.

A. VOLUNTARY CONVEYANCES AND CONSIDERATION, AND EVIDENCE THEREOF.

1. A deed from a parent to a child, for love and affection, is not always absolutely void as against creditors. *Hinde's Lessee v. Longworth*, 11 W. 199....vi. 561.

2. The mere fact of indebtedness to a small amount, the grantor being in prosperous circumstances, and the gift a reasonable provision for the child, will not render the deed fraudulent. *Ib.*

3. Where a deed, purported to be for the consideration of love and affection, though it may not be competent to prove that its consideration was valuable, yet evidence to repel the allegation of fraud, by showing that the father was in debt to the son, is admissible. *Ib.*

4. A voluntary settlement on his wife, by a person not indebted at the time, cannot be impeached by subsequent creditors. *Sexton v. Wheaton*, 8 W. 229....v. 396.

5. The power to make such a settlement is not limited to any specific part of his estate. *Ib.*

6. The mere fact that a disputed claim on him existed at the date of the settlement, the subsequent liquidation of which showed him to be a creditor and

not a debtor, it not being proved that the settlement had any connection with the existence of this claim, is not sufficient to avoid it. *Ib.*

7. To render an ante-nuptial settlement void, as a fraud on creditors, both parties must concur in or have cognizance of the fraud; they must coöperate in the original design, at the time of its concoction, or carry it into effect with notice that it is fraudulent. *Magniac v. Thompson*, 7 P. 348....x. 513.

8. Marriage is a consideration of the greatest value, in contemplation of law, to support such a settlement. *Ib.*

9. A deed of conveyance of slaves by a husband to his wife recited as part of its consideration a release of the wife's right of dower in certain lands of her husband; this deed having been attacked by creditors as fraudulent, *Held*, that though the release had not been made at the date of the deed, if it was made afterwards, in good faith, pursuant to an agreement which preceded the deed, it was sufficient. *Bank of the United States v. Lee*, 13 P. 107....xiii. 68.

10. Another part of the consideration was subjection of lands of the wife to pay a debt of the husband; though, if the debt was ultimately paid out of other property, creditors might treat the wife as a trustee, as to the interest in the lands purchased by the husband, upon a bill properly framed for that purpose, yet this does not render the original conveyance to the wife fraudulent. *Ib.*

11. To avoid a post-nuptial settlement, insolvency need not be proved. *Parish v. Murphree*, 13 H. 92....xix. 407.

12. A merchant, largely indebted, and whose means of payment were subject to many contingencies, was not in a condition to make such a settlement of a large landed estate, and it is voidable by his creditors. *Ib.*

13. A mortgage of lands, conditioned to save the mortgagee harmless from notes thereafter indorsed by him for the accommodation of the mortgagor is not fraudulent, as against creditors, on its face. *United States v. Hooe*, 3 C. 73....i. 531.

## B. POSSESSION AFTER CONVEYANCE.

1. The act of assembly of Virginia against fraudulent sales does not render valid, by recording within eight months, an absolute bill of sale of a chattel not accompanied and followed by possession. *Hamilton v. Russel*, 1 C. 310....i. 415.

2. This act, as respects fraudulent conveyances, is coextensive with the 13th and 27th Eliz. which were in affirmance of the common law. *Ib.*

3. An absolute bill of sale of a chattel, not accompanied and followed by possession, is *per se* fraudulent. *Ib.*

4. If the owner of a slave permit her to remain in the possession of A. for four years, and A. then, without the assent of the owner, delivers her to B., who keeps her four years more, the possession of B. cannot be so connected with the possession of A. as to make it a fraudulent loan within the act of assembly of Virginia, in regard to B.'s creditors. *Auld v. Norwood*, 5 C. 361....ii. 294.

5. The continued possession of the grantor, an insolvent debtor, is sufficiently accounted for, by showing that the property assigned was of such a nature that he could best manage it, and that he had faithfully managed and applied it,

according to the deed of assignment. *Tompkins v. Wheeler*, 16 P. 106....xiv. 202.

**C. EXISTING AND SUBSEQUENT CREDITORS, AND HEREIN WHO ARE SUCH. (*Supra*, A.)**

The holder of a note is a creditor of the indorser within the meaning of the statute respecting conveyances to defraud creditors. *McLaughlin v. Bank of Potomac*, 7 H. 220....xvii. 97.

**D. BADGES OR PRESUMPTIONS OF FRAUD.**

Want of possession of goods assigned while at sea, due diligence to take possession on arrival having been used, or rendered useless, is not a badge of fraud. *Conard v. Atlantic Insurance Company of New York*, 1 P. 386....vii. 637.

**E. WHAT CONVEYANCES ARE OR ARE NOT DEEMED FRAUDULENT PER SE. (*Supra*, A.)**

1. An assignment by a debtor of all his property for the benefit of his creditors, is not presumptively fraudulent. *Brashear v. West*, 7 P. 608....x. 589.

2. In Pennsylvania, such an assignment is not made void by a clause which excludes all from its benefit who do not release the debtor within ninety days. *Ib.*

3. A deed made upon a valuable and adequate consideration, which is actually paid, the change of property being *bond fide*, or such as it purports to be, cannot be considered as a conveyance to defraud creditors. *Wheaton v. Sexton's Lessee*, 4 W. 508....iv. 454.

4. An instruction to the jury, that "if a mortgage conveyed more property than would be sufficient to secure the debt, it was fraudulent," is erroneous, this not being even a badge of fraud. *Downs v. Kissam*, 10 H. 102....xviii. 314.

5. A deed purporting to secure the repayment of 30,000*l.*, may stand as security for the repayment of part of that sum and the indemnity of the mortgagee from liabilities, if there be no fraudulent intent. *Shirras v. Caig*, 7 C. 34....ii. 447.

6. An executor purchased property belonging to the estate of the deceased, and confessed a judgment in favor of two strangers, intending to have them hold it in trust for those entitled to the purchase-money; who afterwards assented to the arrangement. *Held*, that it was not fraudulent and void as against creditors. *Bank of Georgia v. Higginbottom*, 9 P. 48....xi. 277.

## FRAUDS AS TO SUBSEQUENT PURCHASERS.

## VENDOR AND PURCHASER, C.

The English decisions under the 27th Elizabeth, since the Revolution, make the subsequent conveyance for value, even with notice, conclusive evidence that the former voluntary conveyance was fraudulent. This court does not adopt that rule. It holds the subsequent conveyance to be only presumptive evidence of fraud, and in this case the circumstances did not repel the presumption. *Cathcart v. Robinson*, 5 P. 264....ix. 828.

## FRAUDS, STATUTE OF.

CONTRACT, E.; MORTGAGE, A.; SALES, C.; TRUSTS, A. 1.; VENDOR AND PURCHASER, D.

## FREIGHT.

SHIPPING, H.

## FUGITIVES FROM JUSTICE AND SERVICE.

## CONSTITUTIONAL LAW, F.

1. Where a marshal of the United States, under an order of a commissioner, held the petitioner, for the purpose of making extradition of him as a fugitive from justice under the treaty between the United States and Great Britain; and, upon an *habeas corpus*, a circuit court of the United States held the commissioner's proceedings legal; on application to this court, for a writ of *habeas corpus*, Justices M'Lean, Wayne, Catron, and Grier held the decision of the circuit court to be correct. The Chief Justice and Justices Daniel and Nelson held the decision to be erroneous. Mr. Justice Curtis held that this court had not jurisdiction to issue a writ of *habeas corpus* in such a case. *In re Kaine*, 14 H. 108....xx. 68.

2. The statute of Illinois, which punishes any person who shall harbor or secrete a fugitive negro slave, or unlawfully prevent his owner from arresting him, is not in conflict with the constitution, or any law of the United States. *Moore v. Illinois*, 14 H. 18....xx. 6.

HABEAS CORPUS, 9, 10.

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## GENERAL AVERAGE.

INSURANCE, H. 4.



## GIVING TIME.

## BILLS, &amp;c. G. 4.

1. A contract by the holder with the drawer of a bill, for a valuable consideration, to continue an action against the latter, founded on the bill, to the next term, discharges the indorser. *Bank of United States v. Hatch*, 6 P. 250 . . . . x. 104.

2. Taking a mortgage from the principal debtor, as to which time is given for payment, but which is only a collateral security for the debt, and there being no agreement for a valuable consideration to give time to the debtor personally, does not discharge the sureties. *United States v. Hodge*, 6 H. 279 . . . . xvi. 681.

## GRANTS.

## DEEDS ; PUBLIC GRANTS.

## GUARANTEE.

## GIVING TIME ; SUBSTITUTION ; SURETY.

A. WHAT AMOUNTS TO, 234.

B. CONSTRUCTION, AND HEREIN OF CONTINUING GUARANTEES,  
234.

C. DUTY AND RIGHTS OF CREDITORS, 236.

D. LIABILITY AND RIGHTS OF GUARANTOR, 236.

## A. WHAT AMOUNTS TO.

1. To subject one man to pay the debt of another, there must be a clear undertaking ; if the intent is doubtful, the obligation does not exist. *Russell v. Clark's Executors*, 7 C. 69 . . . . ii. 459.

2. *Semble*. A letter of introduction, containing the general statement, "you may be assured of their complying fully with any contracts or engagements they may enter into with you," does not import an undertaking of guarantee. *Clarke v. Russell*, 8 D. 415 . . . . i. 295.

## ASSUMPSIT, A. 1.

B. CONSTRUCTION, AND HEREIN OF CONTINUING GUARANTEES.

1. A letter of guarantee is to receive a fair and reasonable interpretation, so as to obtain its objects, and not a nice or technical construction. *Lawrence v. Mc Calmont*, 2 H. 426 . . . . xv. 178.

2. Letters of guarantee are usually written without technical accuracy, and with reference to many extraneous facts, and that construction should be adopted which is consistent with the fair import of their terms, and ascribes to the parties the most reasonable, natural, and probable conduct. *Bell v. Bruen*, 1 H. 169....xiv. 552.

3. Where a mercantile guarantee is preceded by a recital, definite in its terms, to which the general words of the promise obviously refer, those general words will be construed as limited by the recital. But the general words may be such that they cannot be thus restrained, without depriving some of them of all force and meaning, and this the court refused to do in this case. *Ib.*

4. In aid of the construction of a letter of guarantee, it is proper to have reference to the facts and circumstances which attended its execution; and the court may leave the jury to find those facts, and instruct them, hypothetically, concerning the legal effect of the writing. *Mauran v. Bullus*, 16 P. 528....xiv. 410.

5. The words of a guarantee are to be taken as strongly against a guarantor as their sense will admit. *Douglass v. Reynolds*, 7 P. 113....x. 415.

6. Under the following letter of guarantee: "I hereby guarantee the payment of any purchases of bagging and rope which Thomas Barrett may have occasion to make between this and the 1st of December next." *Held*, 1. That the limitation was of the time within which purchases were to be made, not of the credit to be allowed to the purchaser. 2. That immediate notice of the goods furnished need not be given to the guarantor; all that was required being notice within a reasonable time after the dealings under the guarantee were closed. 3. That the effect of a promise by the guarantor to pay what was due from the principal debtor, there being no new consideration, must depend upon whether he then had knowledge of all the material facts. *Louisville Manufacturing Company v. Welch*, 10 H. 461....xviii. 460.

7. Under an agreement between the third indorser and the indorsee, that the latter should send the note to the bank, where it was made payable, for collection, and in the event of its not being paid at maturity the indorsee should use due diligence to collect it from the maker and prior indorsers. *Held*, 1. That evidence of a usage of any banks except that at which the note was payable, was not admissible. 2. That the presentment of the note at that bank, and demand of payment there, when the note came to maturity, was a compliance with that part of the contract respecting the sending it for collection to that bank. 3. That an honest prosecution of a suit against the maker and prior indorsers, to a judgment and the return of *nulla bona* and proof of actual insolvency and absence from the State were due diligence, though executions were not sent into all the counties where all the defendants resided, and by an erroneous ruling of the court that judgment was for a less sum than should have been recovered. *Camden v. Doremus*, 3 H. 515....xv. 535.

8. A letter written on the same paper with a guarantee, was held to explain it, and show that it was not confined to a bill for \$2,000, as its terms imported, but was good for that amount in a larger bill. *Lee v. Dick*, 10 P. 482....xii. 204.

9. A letter stating that "our friend, C. H., to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his

paper, or advances in cash. In order to save you from harm in doing so, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time, for a sum not exceeding \$8,000, should the said C. H. fail so to do," is a continuing guarantee. *Douglass v. Reynolds*, 7 P. 113....x. 415.

10. A letter, held to be a continuing guarantee, and to import a future consideration. *Lawrence v. McCalmont*, 2 H. 426....xv. 178.

### C. DUTY AND RIGHTS OF CREDITORS. (*Infra*, D.)

In an action upon a guarantee the plaintiff may show that he relied and acted on it in making advances or giving credit. *Douglass v. Reynolds*, 7 P. 113....x. 415.

### D. LIABILITY AND RIGHTS OF GUARANTOR.

BILLS, &c. F. 5, 7; EVIDENCE, G. 1.

1. Notice within a reasonable time, that a guarantee for a future credit has been accepted is necessary. *Reynolds v. Douglass*, 12 P. 497....xii. 816.

2. When a guarantee is prospective, and is to attach on future transactions, the guarantor is entitled to notice that it has been accepted, and also that it has been acted on; but no rule is laid down respecting the time within which notice must be given. *Lee v. Dick*, 10 P. 482....xii. 204.

3. Upon a letter of guarantee, addressed generally, or to a particular person, for a future credit, notice must be given to the guarantor that credit has been given on the faith of it. *Adams v. Jones*, 12 P. 207....xii. 696.

4. Under a continuing guarantee, notice need not be given to the guarantor of each credit given, or liability incurred; but, when the transactions under the guarantee are all closed, notice should be given, within a reasonable time, of the amount for which the guarantors are held responsible; and also, within a reasonable time, demand should be made on the debtor, and notice of his default given to the guarantor. *Douglass v. Reynolds*, 7 P. 113....x. 415.

5. An express and unconditional promise to pay by the guarantor is not necessary to amount to a waiver of notice. *Reynolds v. Douglass*, 12 P. 497....xii. 816.

6. If the principal debtor be insolvent at the time the debt becomes payable, the guarantor is not discharged by want of notice of his default. *Ib.*

7. Insolvency may be proved in such a case in the same manner as other facts; a statute insolvency need not be shown by producing record evidence thereof. *Ib.*

EVIDENCE, F. 5.

### GUARDIANS.

EQUITY, B. i. 1.

A guardian, for the purpose of paying a debt due to his ward, agreed with a third person to exchange certain property of his own for other property of that person. and to take the title to his ward, and died before the contract was

executed; the ward cannot recover back what had been delivered. He must either look to the estate of his guardian, or complete the contract and take the property. *Yerger v. Jones*, 16 H. 30 . . . . xxi. 20.

INFANCY, 8.

## HABEAS CORPUS.

BAIL, A.; COURTS OF UNITED STATES, B. a. 2.

1. The writ of *habeas corpus ad subjiciendum* does not lie to bring up a person confined in the prison bounds upon a *ca. sa.* issued in a civil suit. *Ex parte Wilson*, 6 C. 52 . . . . ii. 318.

2. No court of the United States can issue a writ of *habeas corpus* to bring up a prisoner confined by state process, for any other purpose save to examine him as a witness. *Ex parte Dorr*, 3 H. 103 . . . . xv. 320.

3. Under the 14th section of the judiciary act, (1 Stats. at Large, 81,) this court has power to issue a writ of *habeas corpus* to examine into the cause of a commitment by the circuit court for the District of Columbia. *Ex parte Bollman*, *Ex parte Swartwout*, 4 C. 75 . . . . ii. 23.

4. It is the revision of a decision of an inferior court, confining a person for trial, and therefore is the exercise of appellate jurisdiction. *Ib.*

5. The circuit court of the District of Columbia having awarded a *ca. sa.* to collect a fine, and the defendant being in custody under that process, this court has jurisdiction to award a writ of *habeas corpus* to inquire into the legality of the imprisonment under this process, it being a case of appellate jurisdiction. *Ex parte Watkins*, 7 P. 568 . . . . x. 569.

6. The prisoner not having been brought into court on the return term, and being held solely under the *ca. sa.* his imprisonment was illegal. *Ib.*

7. This court has not authority to issue a writ of *habeas corpus* to bring up the body of a person committed to jail for a contempt by the circuit court for the District of Columbia. *Ex parte Kearney*, 7 W. 38 . . . . v. 211.

8. Where an illegal commitment was made by justices of the peace in the District of Columbia, and the circuit court on *habeas corpus* made a different order of commitment, correcting two errors, but still erroneous, this court has jurisdiction to revise the proceedings of the circuit court upon *habeas corpus* out of this court. *Ex parte Burford*, 3 C. 448 . . . . i. 638.

9. Where one was imprisoned under a warrant from a district judge of the United States, to abide the order of the President of the United States in respect of making extradition of him, as a fugitive from justice, under the convention with France of November 9, 1848, it was held, that this court had not jurisdiction to issue a writ of *habeas corpus*, to inquire into the cause of his commitment. *In the Matter of Metzger*, 5 H. 176 . . . . xvi. 348.

10. A single justice in vacation, cannot issue a writ of *habeas corpus*, and remit the case here for decision. *In re Kaine*, 14 H. 103 . . . . xx. 63.

FUGITIVES FROM JUSTICE AND SERVICE, 1; JURISDICTION, A. a. 13.

## HEIRS.

ALIEN, B. C.; DESCENT AND DISTRIBUTION; ESCHEAT, 2; FRAUD, A. 5; PARTITION; WILL, D. 4.

## HIGH SEAS.

CRIMINAL PROCEDURE, C. 1; JURISDICTION, F; LAW OF NATIONS, B. D.

## HUSBAND AND WIFE.

A. RIGHTS OF THE HUSBAND, 238.

B. RIGHTS, POWERS, AND DISABILITIES OF THE WIFE, 239.

C. SEPARATE ESTATE OF THE WIFE, 239.

## A. RIGHTS OF THE HUSBAND.

1. In Virginia, if the husband survives the wife, he becomes entitled to an interest which she has in a chattel, by way of remainder after an estate for the life of a third person; it is subject to be reduced to possession by him, if living at the termination of the precedent life-estate, or by his administrator, if the husband has deceased. *McClanahan v. Davis*, 8 H. 170 . . . . xvii. 542.

2. Where property of a *feme covert* is conveyed to a trustee for her separate use, and the husband survives the wife, his right to the property as her representative must depend on the question whether he made merely a temporary surrender of his rights during coverture, or abandoned them altogether, as he was held to have done in this instance. *Marshall v. Beall*, 6 H. 70 . . . . xv. 604.

3. But where a bequest of money was made to a trustee for a married woman with a direction to the trustee to allow her to have some part of it occasionally as she might stand in need, there being no limitation over at her decease, and no power of appointment conferred, held that the fund at her decease belonged to the husband as the representative of the wife, and that, under the law of Maryland, his title was perfect without taking administration on her estate. *Ib.*

4. A husband has no estate by the curtesy, in lands of which his wife was disseised at the time of the marriage, and upon which he never entered; actual seisin, during the coverture, being necessary to constitute that estate. *Mercer's Lessee v. Selden*, 1 H. 37 . . . . xiv. 491.

5. In Kentucky, seisin in deed is not essential to a tenancy by the curtesy, if the lands were vacant—seisin in law is sufficient. *Davis v. Mason*, 1 P. 503 . . . . vii. 679.

PROCHAIN AMI, 1.

## B. RIGHTS, POWERS, AND DISABILITIES OF THE WIFE.

## DOWER; ELECTION; FRAUDS AS TO CREDITORS, A.

1. Though a *feme covert*, abandoned by her husband, may contract debts as a *feme sole*, she cannot, under the law of Maryland, convey her lands by her separate deed. *Rhea v. Rhenner*, 1 P. 105 . . . vii. 478.

2. Under the charter of the Union Bank of Louisiana, it was held, that a married woman could and did bind her property by a contract of borrowing jointly with her husband, whatever might be the general law of Louisiana on the subject. *Union Bank of Louisiana v. Stafford*, 12 H. 327 . . . xix. 160. *New Orleans Canal and Banking Company v. Stafford*, 12 H. 343 . . . xix. 168.

3. Though, under the law of Louisiana, the wife cannot be a surety for the husband, and a loan contracted for his benefit in her name does not bind her, yet, if she induces the lender to believe the loan is made to her, and for her benefit exclusively, a court of equity will not aid her to set aside a mortgage given to secure its payment. *Bein v. Heath*, 6 H. 228 . . . xvi. 663.

4. A conveyance of slaves, by a husband to his wife, in consideration of a discharge of a decree for alimony on a separation, is valid in equity, and the wife has power to manumit the slaves. It is not a valid objection that the suit for alimony was not discontinued, if the wife be dead and never claimed payment. *Wallingsford v. Allen*, 10 P. 588 . . . xii. 255.

5. By a valid ante-nuptial settlement, the wife becomes a creditor of the husband, and after marriage he may prefer that debt. *Magniac v. Thompson*, 7 P. 348 . . . x. 513.

6. Actual maintenance, by the husband, is, in general, a satisfaction of a promise by him to pay an annual sum for maintenance, if the parties live together, and no claim for the annual sum is made. *Hunter v. Bryant*, 3 W. 32 . . . iv. 13.

7. A married woman is not liable to an action of covenant, though she join with her husband in warranting the land as to which she releases her claim to dower. *Griffin v. Reynolds*, 17 H. 609 . . . xxi. 725.

DEED, A. 12; POWERS, A. 12; TRUSTS, B. 4, 5.

## C. SEPARATE ESTATE OF THE WIFE.

1. Though a wife is silent when she knows her husband is holding out her property as his own, she is not estopped by her mere silence. *Bank of the United States v. Lee*, 13 P. 107 . . . xiii. 68.

2. If a husband shows to his wife a letter written by him to a creditor, and containing statements concerning separate property of the wife, calculated to mislead the creditor, and the wife advises her husband not to send the letter, and believes he concludes not to send it, she is not affected by its contents. *Sexton v. Wheaton*, 8 W. 229 . . . v. 396.

FRAUDS AS TO CREDITORS, A. 9, 10.

## ILLEGITIMATE CHILDREN.

BASTARD ; DESCENT AND DISTRIBUTION.

## INDIANS.

A. INDIAN TRIBES, 240.

B. TRADE AND INTERCOURSE WITH, 240.

C. TITLES TO LAND, 240.

1. WHAT THE ABORIGINAL TITLE IS.

2. TITLES CONFERRED BY TREATY OR ACT OF CONGRESS.

D OTHER MATTERS, 241.

### A. INDIAN TRIBES.

JURISDICTION, A. a.

1. The relations between the Indian tribes and the United States examined. *Worcester v. Georgia*, 6 P. 515....x. 214.

2. The law of Georgia, which subjected to punishment all white persons residing within the limits of the Cherokee nation, and authorized their arrest within those limits, and their forcible removal therefrom, and their trial in a court of the State, was repugnant to the constitution, treaties, and laws of the United States, and so void ; and a judgment against the plaintiff in error, under color of that law, was reversed by this court, under the 25th section of the judiciary act, (1 Stats. at Large, 85.) *Ib.*

AGENT, I. 5.

### B. TRADE AND INTERCOURSE WITH.

1. If spirits are carried into the Indian country in violation of the act of congress, all the goods of the offender there are forfeited, and not merely those among which the spirits are found, when seized. *American Fur Company v. United States*, 2 P. 358....viii. 137.

2. But it is not a violation of an act of congress to carry spirits into a country which has been purchased of the Indians by the United States, and which is not included within the boundary line defining the Indian country. *Ib.*

### C. TITLES TO LAND.

1. WHAT THE ABORIGINAL TITLE IS.

1. The Indian title to their lands in Florida, and the rights and practices of the crown of Spain in reference thereto, examined. *Mitchell v. United States*, 9 P. 711....xi. 539.

2. Entries and grants of lands within the Indian territory of North Carolina



are void by the laws of that State, though the State had the power to grant the fee, subject to the Indian right of occupancy. *Lattimer's Lessee v. Poteet*, 14 P. 4....xiii. 806.

3. A grant of land in the possession of the Indians, by the Spanish authorities in Florida, passed the title of the crown, and made a title to the land, subject only to the Indian title. Such a title is valid as against the United States, under the treaty of cession of February 22, 1819, (8 Stats. at Large, 252.) *United States v. Fernandez*, 10 P. 808....xii. 134.

## PUBLIC LANDS OF THE UNITED STATES, I. 13, III. B. 8.

### 2. TITLES CONFERRED BY TREATY OR ACT OF CONGRESS.

1. A supplemental article to a treaty of cession of land, with a tribe of Indians, reciting that a certain quantity of land had been granted by the tribe to certain persons, and stipulating that those persons should have their right to the said land reserved, for them and their heirs and assigns forever, to be laid off in the southeast corner of the lands ceded, gave a fee-simple to the persons named, and their grantee has a perfect title. *United States v. Brooks*, 10 H. 442....xviii. 445.

2. Under the treaty between the United States and the Creek tribe of Indians of March 24, 1832, (7 Stats. at Large, 366,) it was held: 1. That the twenty sections of land to be selected by the President for the orphan children of the tribe, were not to be taken from the lands reserved for the tribe by the preceding stipulations of the treaty. 2. That a grandmother, with whom some of her grandchildren resided, was the head of a family, and entitled to a half section of land, as such. *Ladiga v. Roland*, 2 H. 581....xv. 211.

3. The act of June 30, 1834, (4 Stats. at Large, 740,) vested the ultimate title of the United States to the reservation therein described, in the half-breeds of the Sac and Fox Indians, and this title must prevail against a subsequent patent, unless those claiming under the patent can show that it issued pursuant to some better title than that under the act of congress, and of this the recitals in the patent are not competent evidence. *Marsh v. Brooks*, 8 H. 223... xvii. 565.

4. The treaty of 1804, (7 Stats. at Large, 84,) between the United States and the Sac and Fox Indians, protected the title of a settler on the Indian lands under a Spanish permit, who, at the date of the treaty, had had open and notorious occupation of the land for such a length of time as to raise a presumption that the Indians had notice of the claim at the date of the treaty. *Marsh v. Brooks*, 14 H. 513....xx. 310.

### TREATIES, B. 1.

### D. OTHER MATTERS.

By the laws of Mexico, an Indian was capable of receiving a grant of land, and holding it, with the same rights as a white person. *United States v. Ritchie*, 17 H. 525....xxi. 656.

### CONSTITUTIONAL LAW, A. 12, 13.

## INDICTMENT.

CRIMINAL PROCEDURE, A.

## INFANCY.

1. Infancy is a bar to an action by an owner against his supercargo for breach of instructions ; but not to an action of trover for the goods. *Vasse v. Smith*, 6 C. 226 . . . . ii. 379.

2. Still, however, infancy may be given in evidence in an action of trover, upon the plea of not guilty ; not as a bar, but to show the nature of the act which is supposed to be a conversion. *Ib.*

3. An infant is liable in trover, although the goods were delivered to him under a contract. *Ib.*

4. An infant may avoid his voidable acts by different means, according to the nature of the act to be avoided. *Tucker's Lessees v. Moreland*, 10 H. 58 . . . . xii. 14.

5. A conveyance by bargain and sale, the infant remaining in possession, may be avoided by a second conveyance by bargain and sale, with a warranty, against all claims under the bargainor. *Ib.*

6. Such a second conveyance, though made for the mere purpose of defeating the first, is valid. *Ib.*

7. A mere recognition of a conveyance by an infant does not confirm it ; the act of confirmation should establish an intention to confirm it, with knowledge that it was voidable. *Ib.*

8. The duty of watching over the interests of infant defendants, devolves, in a considerable degree, on the court ; and it is a mark of inexcusable inattention to appoint a guardian *ad litem* on the motion of the opposite counsel, without bringing the minors into court, or issuing a commission for the purpose of making inquiry as to the appointment. *Bank of the United States v. Ritchie*, 8 P. 128 . . . . xi. 46.

CONTRACT, C. 13.

## INFORMATION.

ADMIRALTY, B. 1 ; CRIMINAL PROCEDURE, A.

1. Though a bill of information in the name of the district attorney, in behalf of the United States, may be valid, yet the correct practice is to bring suits in the name of the United States, when they are the real parties. *Benton v Woolsey*, 12 P. 27 . . . . xii. 616.

2. And where a proceeding is in the form of an information by the district attorney in behalf of the United States, if it shows rights and claims a remedy for the United States, though it should have been simply a bill in equity in the name of the United States, it will not be dismissed on demurrer for this defect of form. *United States v. Hughes*, 11 H. 552 . . . . xviii. 711.

## INJUNCTION.

## A. POWER TO ISSUE, 243.

## B. IN WHAT CASES GRANTED OR REFUSED, 243.

## C PRACTICE AND EVIDENCE, 244.

## A. POWER TO ISSUE. (CORPORATIONS, D. 3.)

1. Neither the supreme nor circuit courts, nor a single judge, can grant a writ of injunction without reasonable notice. *New York v. Connecticut*, 4 D. 1 . . . . i. 309.

2. What is reasonable notice depends on the circumstances of the case. *Ib.*

3. An injunction to stay proceedings at law will not be granted at the instance of one not a party to, or interested in, those proceedings. *Ib.*

4. An injunction out of the circuit court, to stay proceedings on a judgment at law, in that court, may issue, notwithstanding the pendency of a writ of error on the judgment in this court. *Parker v. The Judges of the Circuit Court of Maryland*, 12 W. 561 . . . . vii. 358.

5. An injunction issued by order of the district judge, expires at the next term of the court, unless continued by the court; but the denial of several successive motions to dissolve the injunction, may, under circumstances, be considered as equivalent to an order for renewing it. *Ib.*

6. Injunction continued until the State of Georgia could try its right at law. *Georgia v. Brailsford*, 2 D. 415 . . . . i. 13.

## B. IN WHAT CASES GRANTED OR REFUSED.

## JUDGMENTS, &amp;c. E.

1. Any fact, which clearly proves it to be against conscience to execute a judgment at law, of which the complainant could not have availed himself in a court of law, or which he was prevented from availing himself of, by fraud, or accident, unmixed with any fault or negligence of himself, or his agent, will induce a court of equity to enjoin the judgment. *Marine Insurance Company of Alexandria v. Hodgson*, 7 C. 332 . . . . ii. 557.

2. But a legal defence, actually made at law, is not ground for a bill, though the court may be of opinion it ought to have prevailed. *Ib.*

3. An obligee having recovered a judgment on a bond, claimed by the State of Georgia under an act confiscating British debts, and execution having issued, the State filed a bill in this court setting out its title, and a temporary injunction was granted to stay the money in the hands of the marshal until the title of the State could be tried. *Georgia v. Brailsford*. 2 D. 402 . . . . i. 4.

4. A judgment creditor agreed with his debtor to resort for payment to a fund created by a deed of trust, which, without the knowledge of the creditor, contained a limitation of time for parties to come in, and the time had expired; *held*, that the debtor could not enjoin the judgment without first enabling the

## 244 INJUNCTION—INSOLVENCY—INSOLVENT LAWS.

creditor to come in under the deed. *Mechanics' Bank of Alexandria v. Lynn*, 1 P. 376 . . . . vii. 633.

ATTORNEY AND COUNSEL, B. 4, 5, 6; CONTRACT, C. 14.

### C. PRACTICE AND EVIDENCE.

EQUITY, B. b. 1; *Supra*, A.

If the answer neither admits nor denies the allegations of the bill, they must be proved on the final hearing; but upon a question of dissolution of an injunction they are to be taken to be true. *Young v. Grundy*, 6 C. 51 . . . . ii. 317.

## INSOLVENCY.

PRIORITY OF PAYMENT OF THE UNITED STATES; RECEIVERS OF PUBLIC MONEY.

A discharge of the drawer, under the act for the relief of persons imprisoned for debt, though the creditor waived the right to insist on thirty days' imprisonment after judgment, is sufficient evidence of the insolvency of the drawer. *Bank of United States v. Weisiger*, 2 P. 331 . . . . viii. 129.

GUARANTEE, D. 7.

## INSOLVENT LAWS.

CONSTITUTIONAL LAW, J. L. P.

A. OF THE ASSIGNEE, AND WHAT PASSES TO HIM, 244.

B. OF THE DEBTORS, AND HEREIN OF THEIR DISCHARGE, AND WHETHER VALID, 255.

C. OF THE CREDITORS, 245.

D. DECEASED INSOLVENTS, 246.

### A. OF THE ASSIGNEE, AND WHAT PASSES TO HIM.

1. The trustee of an insolvent debtor, in the District of Columbia, represents the creditors of the insolvent, and can take advantage of a failure to record a mortgage, which the law makes void as to creditors. *Bank of Alexandria v. Herbert*, 8 C. 36 . . . . iii. 14.

2. Where a party became insolvent in South Carolina, and his assignee, under the insolvent laws of that State, took no steps to connect himself with a suit pending in the circuit court of the United States for the district of Georgia, until after a final decree, he was held to be barred thereby. *Kennedy v. Georgia State Bank*, 8 H. 586 . . . . xvii. 714.

3. A claim on the United States for services as a gauger, disallowed by the

accounting officers of the treasury because not provided for by any law, and subsequently required to be paid by a special act of congress, passes by an assignment of the claimant's estate and effects, made by the debtor in compliance with the insolvent law of Pennsylvania, where he resided. *Milnor v. Metz*, 16 P. 221....xiv. 261.

**B. OF THE DEBTORS, AND HEREIN OF THEIR DISCHARGE, AND WHETHER VALID.**

CONSTITUTIONAL LAW, J. L.; LAWS OF THE SEVERAL STATES, A. 1; STATE COURTS, A. 3.

1. The payee of a note may sue thereon, though he has become insolvent under the laws of Louisiana, he being one of the syndics, to settle his own estate. *Randon v. Toby*, 11 H. 493....xviii. 694.

2. The discharge of a debtor, taken on execution out of a court of the United States, by proceedings had under color of a state law, was an escape. *Bank of the United States v. Tyler*, 4 P. 366....ix. 100.

3. An insolvent debtor who has received a certificate of discharge from arrest and imprisonment under a state insolvent law, is not entitled to be discharged from execution at the suit of the United States. *United States v. Wilson*, 8 W. 253....v. 405.

4. Under the act of January 6, 1800, for the relief of insolvent debtors, (2 Stats. at Large, 4,) the debt is not discharged. *King v. Riddle*, 7 C. 168....ii. 500.

5. Under the fifth section of the act of January 6, 1800, (2 Stats. at Large, 6,) the day of entering judgment corresponds with the day of the arrest under the previous sections; and in thirty days after judgment the debtor may be discharged by complying with the other requirements of the law. *Bank of the United States v. Weisiger*, 2 P. 331....viii. 129.

6. A magistrate who has received a deed of trust from an insolvent debtor, which deed is fraudulent in law, as to creditors, is incompetent to sit as a magistrate in the discharge of the debtor under the insolvent law of Virginia. *Slacum v. Simms*, 5 C. 363....ii. 295.

7. And the discharge so obtained is not a discharge in due course of law. *Ib.*

8. Under the laws of Rhode Island, a discharge, according to the act for the relief of poor prisoners for debt, although obtained by fraud and perjury, is a lawful discharge, and not an escape; and, upon such a discharge, no action can be maintained upon a bond for the liberty of the prison yard. *Ammidon v. Smith*, 1 W. 447....iii. 629.

9. If a creditor, who is a citizen of one State, voluntarily makes himself a party to proceedings under the insolvent laws of another State, and his debtor obtains a discharge in such proceedings, his debt is released. *Clay v. Smith*, 3 P. 441....viii. 466.

UNITED STATES, B. 6.

**C. OF THE CREDITORS.**

1. Under the insolvent law of Louisiana, a creditor is entitled to personal

notice, and if not given, the proceedings, as to him, are not binding. *Breedlove v. Nicolet*, 7 P. 418....x. 527.

2. A creditor who obtains a judgment, after petition for the benefit of an insolvent law was filed, but before an assignment was made of the effects of an insolvent, has a right to participate in those effects. *Hunter v. United States*, 5 P. 178....ix. 271.

*Supra*, B. 4.

#### D. DECEASED INSOLVENTS.

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### INSTRUCTIONS TO JURY.

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## II. FIRE INSURANCE.

### I. MARINE INSURANCE.

#### A. INSURABLE INTEREST.

1. One partner effecting insurance in his own name on property on board a certain vessel, as property may appear, cannot recover indemnity for a loss sustained by his firm. *Graves v. Boston Marine Ins. Co.* 2 C. 419.... i. 514.

2. A master, being the legal owner of the whole cargo and the equitable owner of part of it, has an insurable interest in the whole. *Buck v. Chesapeake Ins. Co.* 1 P. 151....vii. 508.

#### B. POLICY.

##### I. FORM, AND HEREIN OF VALUED POLICIES.

1. A policy of insurance will not be reformed by a court of equity, after a loss, upon doubtful proof of the intention of the insured, or of its communication to the underwriter. *Graves v. Boston Marine Ins. Co.* 2 C. 419.... i. 514.

2. In an action upon a valued policy, it is not competent for the underwriters to give parol evidence that the real value of the subject insured is different from that stated in the policy. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 C. 206....ii. 373.

3. A valuation, not fraudulent, is binding. *Hodgson v. Marine Ins. Co. of Alexandria*, 5 C. 100....ii. 201.

4. If a cargo be insured in several different policies, and in one the invoice ruble is valued, and in others not—in adjusting a loss under the valued policy, the cost of the whole cargo is to be brought into dollars, reckoning the ruble at its agreed value; and the amounts actually paid under the other policies being deducted, the residue of the loss is the amount due. *Pleasants v. Maryland Ins. Co.* 8 C. 55....iii. 22.

5. Insurance on profits, valuing them at \$20,000—*Held*, that a total loss of the cargo was a total loss of the profits insured, without proof that any profits would have been made, if no loss had occurred. *Patapsco Ins. Co. v. Coulter*, 3 P. 222....viii. 388.

##### 2. PARTIES.

*Supra*, A.; *Infra*, D. 12-14.



## 3. CONSTRUCTION.

*Infra*, F.

The clause authorizing the assured, in case of any loss or damage, to sue, labor, &c., applies only to losses within the policy. *Biays v. Chesapeake Insurance Company*, 7 C. 415 . . . ii. 600.

## 4. CONTRACT FOR.

CONTRACT, A. 5; *Supra*, B. 1.

## C. WARRANTY.

1. An exception of certain risks in a policy of insurance is not a warranty. *Yeaton v. Fry*, 5 C. 835 . . . ii. 285.

2. If the interest of one joint owner of a cargo be insured, and if that interest be neutral, it is no breach of the warranty of neutrality if the other joint owner, whose interest is not insured, be a belligerent. *Livingston v. Maryland Insurance Company*, 6 C. 274 . . . ii. 400.

3. The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral. *Ib.*

4. Anti-neutral conduct forfeits the warranty of neutrality of the vessel in a policy. *Maryland Insurance Company v. Woods*, 6 C. 29 . . . ii. 310.

5. Without such a warranty an attempt to enter a blockaded port does not put an end to the policy. *Ib.*

6. Under a policy containing a warranty of neutrality of the vessel, "proof of which to be required in the United States only," a foreign sentence of condemnation for breach of blockade, is not conclusive evidence of breach of that warranty. *Ib.*

7. If a sentence of a vice-admiralty court be taken as conclusive of the particular facts which it alleges, those facts not amounting to a cause of condemnation, it does not falsify a warranty of neutrality. *Fitzsimmons v. Newport Insurance Company*, 4 C. 185 . . . ii. 65.

8. A ship warranted to be an American, is impliedly warranted to conduct as American. *Ib.*

9. And an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character. *Ib.*

10. If Spanish papers are taken on board by the usage of the trade, to be used in a Spanish port to protect the property, it is not a breach of warranty of neutrality to conceal them from a British cruiser. *Livingston v. Maryland Insurance Company*, 7 C. 506 . . . ii. 648.

## D. REPRESENTATION AND CONCEALMENT.

*Supra*, C.

1. The effect of a misrepresentation or concealment, upon a policy, depends upon its materiality to the risk, which must be decided by a jury, under the direction of a court. *Livingston v. Maryland Ins. Co.* 6 C. 274 . . . ii. 400.

2. The operation of a concealment, on the policy, depends on its materiality to the risk; and this materiality is a subject for the consideration of a jury. *Maryland Insurance Company v. Ruden's Administrator*, 6 C. 338 . . . ii. 426.

3. If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured to take such papers, the non-disclosure of the fact that they would be on board will vacate the policy. *Livingston v. Maryland Ins. Co.* 6 C. 274: . . . ii. 400.

4. To constitute a misrepresentation, in obtaining insurance, there must be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to a conclusion. *Livingston v. Maryland Ins. Co.* 7 C. 506 . . . ii. 648.

5. If the expressions are ambiguous, the insurer should ask for an explanation. *Ib.*

6. A letter was written by a merchant in New York, to his correspondent in Boston, ordering insurance on a ship belonging to, and then in the port of New York. The letter contained a representation that the ship was "coppered." *Held*, that this must be construed with reference to the New York meaning of the terms "a coppered ship." *Hazard's Administrator v. New England Marine Ins. Co.* 8 P. 557 . . . xi. 215.

7. Certain statements held not to amount to a representation of neutrality of property. *Buck v. Chesapeake Ins. Co.* 1 P. 151 . . . vii. 508.

8. A representation that the cargo is to be covered as American, is substantially complied with if it was in fact American. *Hughes v. Union Ins. Co.* 8 W. 294 . . . v. 420.

9. An innocent misrepresentation, not material to the risk, does not avoid the policy. *Hodgson v. Marine Ins. Co. of Alexandria*, 5 C. 100 . . . ii. 201.

10. If a party who has ordered insurance has information of a loss, he is bound to use due and reasonable diligence to make it known to his agent, and to countermand his order. *M'Lanahan v. Universal Ins. Co.* 1 P. 170 . . . vii. 518.

11. What is such diligence depends on the circumstances of each case, and is principally matter of fact for a jury. *Ib.*

12. Insurance effected by an owner after a loss, in good faith, is not vitiated by the fact that the master concealed the loss from the owner, with intent to have him procure insurance. *General Interest Ins. Co. v. Ruggles*, 12 W. 408 . . . vii. 254.

13. If insurance be made for whom it may concern, undue concealment as to the parties interested cannot be alleged. *Hodgson v. Marine Ins. Co. of Alexandria*, 5 C. 100 . . . ii. 201.

14. In such a case, the policy covers the property of a belligerent, unless there is an express warranty that it is neutral property. *Ib.*

15. If the letter submitted to the underwriters, ordering the insurance, refer to another letter previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the papers necessary to make the voyage legal. *Livingston v. Maryland Ins. Co.* 7 C. 506 . . . ii. 648.

EVIDENCE, F. 19; *Infra*, II. 7-11.

#### E. SEA-WORTHINESS.

1. Sea-worthiness for lying in port may be quite a different thing from sea-

worthiness for a voyage. *M'Lanahan v. Universal Ins. Co.* 1 P. 170... vii. 518.

2. Sea-worthiness and deviation are mixed questions of fact and law, and the aid of a jury is generally necessary to their decision. *Ib.*

3. Under a clause in a policy, "if the vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, the underwriter shall not be bound to pay his subscription," a state of rottenness at any period of the voyage is conclusive evidence of unseaworthiness at its commencement, and the determination of that fact by a regular survey is conclusive evidence of it between the parties. *Dorr v. Pacific Ins. Co.* 7 W. 581 ....v. 338.

4. A report that the vessel was found "in a very decayed condition," and that she was "altogether unworthy of being repaired, and ought to be condemned as being unsafe and unfit ever to go to sea again," is sufficient under the above clause in the policy. *Ib.*

5. A report of surveyors that a vessel is unsound on the 17th of November, 1802, at a port of necessity, does not conclusively prove that she was so at the outset of the voyage on the 24th of October, 1802, in the absence of all parol evidence. *Marine Ins. Co. of Alexandria v. Wilson*, 3 C. 187 ....i. 555.

6. A survey by the master and wardens of the port of New Orleans, the persons appointed by the law of Louisiana for that purpose, is "a regular survey" within the meaning of the "rotten clause" in a policy. *Janney v. Columbian Ins. Co.* 10 W. 411 ....vi. 458.

7. Though such surveyors have not power by law to condemn a vessel, yet if the master, being a part owner, acquiesces in the condemnation, and breaks up the voyage, it is too late to deny the validity of the condemnation, under this clause in the policy. *Ib.*

8. A condemnation, because the vessel was so much decayed that the cost of repairs would exceed her value when repaired, brings the case within the terms of the "rotten clause." *Ib.*

#### F. WHAT VOYAGE, RISKS, CAUSES OF LOSS AND PROPERTY ARE WITHIN THE POLICY.

FOR SALES BY MASTER, *see* SHIPPING, E.; FOR BARRATRY, *see* SHIPPING, G.

1. If the *termini* of the voyage entered on are the same as those of the voyage described in the policy, an intention to touch at an intermediate port, does not render it a different voyage from that specified in the policy. *Marine Ins. Co. of Alexandria v. Tucker*, 3 C. 357 ....i. 605.

2. An intention to deviate, not acted on, does not affect the policy. *Ib.*

3. A policy "at and from A. to T. and two other ports in the West Indies, and back to her port of discharge, in the United States, upon all lawful goods," &c., being construed with reference to the known course of the trade, covers the return cargo. *Columbian Ins. Co. v. Catlett*, 12 W. 383 ....vii. 234.

4. A policy of insurance on a vessel, "at and from," an island, protects her

in sailing from port to port of the island to take in a cargo. *Dickey v. Baltimore Ins. Co.* 7 C. 327....ii. 554.

5. Insurance against "all risks, blockaded ports and Hispaniola excepted," covers the risks of a voyage to a port in fact blockaded, but not known to be so till the vessel was warned off. *Yeaton v. Fry*, 5 C. 335....ii. 285.

6. Such an exception covers only the particular dangers of blockade, which induced the exception. *Ib.*

7. Sailing for a port knowing it to be blockaded, would have incurred a blockade risk, and been within the exception. *Ib.*

8. An effect, which is an inevitable consequence of a peril of the sea, must be ascribed to that as its cause. *United States v. Hall*, 6 C. 171....ii. 355.

9. To entitle the plaintiff to recover in an action on a policy of insurance, the loss must be occasioned by one of the perils insured against. *Swan v. Union Ins. Co. of Maryland*, 3 W. 168....iv. 188.

10. The insured cannot recover for a loss by barratry, unless the barratry produced the loss. *Ib.*

11. A loss by fire intentionally set by the master and crew with a barratrous intent, is a loss by barratry, and cannot be recovered for under a policy, not insuring against barratry, specifically. *Waters v. Merchants' Louisville Ins. Co.* 11 P. 213....xii. 400.

12. When a policy covers the risks of fire and barratry, and fire is the proximate cause of the loss, the underwriter cannot defend upon the ground that negligence caused the fire. *Patapsco Ins. Co. v. Coulter*, 3 P. 222....viii. 383.

13. A fire which causes an explosion, and thus a loss, is the proximate cause of that loss. *Waters v. Merchants' Louisville Ins. Co.* 11 P. 213....xii. 400.

14. If worms ordinarily assail and injure vessels, in the voyage insured, a loss by them is not within the policy. *Hazard's Administrators v. New England Marine Ins. Co.* 8 P. 557....xi. 215.

15. If a vessel takes the ground, and is injured, and so exposed to worms, by which she is destroyed, her destruction is attributable, not to her injury by stranding, but to worms, provided the master had opportunity to repair the damage done by stranding. *Ib.*

16. Seizure for an attempt at illicit trade is not a loss within a policy containing an exception of the risk of illicit trade. *Church v. Hubbard*, 2 C. 187....i. 470.

17. If a seizure and detention be *bonâ fide* for illicit trade, a sentence of condemnation or acquittal, or other regular proceedings, are not necessary to discharge the underwriter. *Carrington v. Merchants' Ins. Co.* 8 P. 495....xi. 192.

18. To bring a case within the exception in a policy of seizures for illicit or contraband trade, the seizure or detention must be *bonâ fide*, and upon reasonable grounds; an act of lawless violence, or a seizure under a mere pretence, is not within the exception. *Ib.*

19. Though the contraband articles had been landed in the progress of the outward voyage, yet as the vessel and cargo belonged to the same owners, and

the destination and papers were simulated, there was reasonable cause for the seizure. *Ib.*

20. Generally, when contraband goods have been landed and the vessel has proceeded on her voyage, neither the vessel nor the remaining cargo are liable to seizure; *aliter*, if the destination and papers are false. *Ib.*

21. The insurers do not undertake that it shall be lawful to trade at the port of destination, and if the voyage is abandoned from fear of forfeiture for illicit trade, if the vessel should proceed to the port of destination, this does not amount to a total loss of the cargo. *Smith v. Universal Ins. Co.* 6 W. 176.... v. 50.

22. The master of a vessel was not bound, as respects the underwriters, to depart from an island upon a threat of seizure by a government not having jurisdiction there; he might lawfully stand on his rights, and refuse to leave, without being considered to have voluntarily incurred a risk which resulted in the loss of the vessel to the owners. *Williams v. Suffolk Ins. Co.* 13 P. 415 ....xiii. 225.

23. Where a collision occurred, in the River Elbe, between a vessel insured by the defendants and another vessel, and upon a libel in an admiralty court in Hamburg, by the master of the latter against the former vessel, the court decreed that the collision was without fault on either side, and, pursuant to the law of the tribunal, each was to bear half the entire loss suffered by both. *Held*, 1. That the collision was the proximate cause of the whole loss borne by the vessel insured. 2. That the foreign law, which imposed part of the loss suffered by the other vessel on the vessel insured, was not to be deemed the cause of that loss to the insured. 3. That the underwriters were liable for it. *Peters v. Warren Ins. Co.* 14 P. 99....xiii. 370.

24. Damages decreed by a court of admiralty to be a lien on the vessel insured, by reason of a collision produced by the negligence of those who navigated that vessel, cannot be recovered, under a policy, insuring against the usual perils, and including barratry. *General Mutual Ins. Co. v. Sherwood*, 14 H. 851....xx. 221.

25. Where money is necessarily taken upon bottomry to defray the expense of repairing a partial loss, the underwriter has nothing to do with the bottomry bond, though he is liable to pay his share of the extra expense of thus obtaining the money. *Bradlie v. Maryland Ins. Co.* 12 P. 378....xii. 745.

26. If a voyage is abandoned by reason of fear of seizure founded on false information, no real cause for seizure existing, underwriters on freight are not liable. *King v. Delaware Ins. Co.* 6 C. 71....ii. 322.

27. Under a warranty by the assured, "free from average, unless general," the underwriter is not liable for a partial loss. *Biays v. Chesapeake Ins. Co.* 7 C. 415....ii. 600.

28. If the insurer make no inquiry as to the neutrality of the interest, an insurance "for whom it concerns" covers belligerent property. *Buck v. Chesapeake Ins. Co.* 1 P. 151....vii. 508.

29. But if an express representation is made that the property is neutral, a policy "for whom it concerns" does not cover property of a belligerent. *Ib.*

30. Where a specific sum was insured on cargo for a round voyage, the whole sum was at risk, though part of the outward cargo had been landed, that amount of property being on board. *Columbian Ins. Co. v. Catlett*, 12 W. 383.... vii. 234.

*Infra*, II. 12.

G. DEVIATION AND CHANGE OF RISK. (*Supra*, F. 1, 2.)

1. Delay to accomplish the objects of the voyage by selling the cargo reasonably, and according to the known course of the trade, is not a deviation. *Columbian Ins. Co. v. Catlett*, 12 W. 383.... vii. 234.

2. Under a policy upon vessel and freight "at and from Teneriffe to Havana, and at and from thence to New York, with liberty to stop at Matanzas," it is not a deviation to unlade cargo at Matanzas, if the vessel was then necessarily waiting in that port to avoid cruisers, and the unlivery occasioned no delay. *Hughes v. Union Ins. Co. of Baltimore*, 8 W. 294.... v. 420.

3. Under such a policy, it is not a deviation to take a cargo at Havana for New York, though the vessel sailed from Teneriffe under a charter-party which secured a round sum for the hire of the vessel for the whole voyage, and with a cargo which was to be landed at Havana, this charter-party not being represented to the underwriters. *Ib.*

4. Where liberty was given to touch at Matanzas, and the object was known to both parties to be to obtain information whether men of war were off Havana, discharge of cargo at Matanzas, which produced no delay and no increase of risk, was not a deviation. *Hughes v. Union Ins. Co.* 3 W. 159.... iv. 185.

5. If the plaintiffs do any act which increases the risk of capture and detention according to the common practice of the belligerent, it may avoid the policy. *Livingston v. Maryland Ins. Co.* 7 C. 506.... ii. 648.

6. It is not necessary that the risk thus increased, should be the risk of rightful capture, according to the law of nations. *Ib.*

7. If insurance be made at and from A to B, and at and from B back to A, unnecessary delay at B is a deviation. *Oliver v. Maryland Ins. Co.* 7 C. 487.... ii. 635.

8. What delay is unnecessary, must depend on the circumstances of each case, and not upon a usage of the port; but the latter may be evidence of what was necessary. *Ib.*

9. If the vessel remain at B long enough to take a cargo, and then sail without cargo for C, where it is usual to touch, and there remain and take a cargo, this is a deviation, unless the delay was in conformity with a usage to wait at B to have a cargo collected at C. *Ib.*

10. Even extraordinary indefinite danger of capture, will not justify delay at a port. The danger must be obvious and immediate in reference to the situation of the ship at the particular time. *Ib.*

11. Departure to learn whether a port, not of destination, is blockaded, is a deviation. *Maryland Ins. Co. v. Woods*, 6 C. 29.... ii. 310.

12. Liberty to "touch at C. for stock, and to take in water," does not justify taking on board jackasses and bullocks as cargo. Delay for that purpose is a



deviation, and it is not material that the risk was not increased. *Maryland Ins. Co. v. Le Roy*, 7 C. 26 . . . ii. 441.

## H. LOSS.

### 1. TOTAL, AND HEREIN OF MEMORANDUM ARTICLES.

1. The entire loss of the voyage does not *per se* constitute a technical total loss of cargo; the loss of the cargo must be occasioned by some peril insured against, acting directly on the subject insured. *Smith v. Universal Ins. Co.* 6 W. 176 . . . v. 50.

2. Total loss of the cargo during the voyage, does not constitute a technical total loss of the vessel. *Alexander v. Baltimore Ins. Co.* 4 C. 370 . . . ii. 140.

3. A recapture does not necessarily prevent a loss from being total; whether it has this effect depends on the particular circumstances. *Marine Ins. Co. of Alexandria v. Tucker*, 3 C. 357 . . . i. 605.

4. If a sale of a perishable cargo becomes necessary, in consequence of a peril of the sea, before arrival at the port of destination, it is a case of constructive total loss. *The Columbian Ins. Co. v. Catlett*, 12 W. 383 . . . vii. 284.

5. Where a technical total loss is sought to be maintained upon the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, all deterioration of memorandum articles must be excluded from the estimate. *Marcadier v. Chesapeake Ins. Co.* 8 C. 39 . . . iii. 15.

6. The insurer on memorandum articles is only liable for a total loss, which can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination. *Morean v. United States Ins. Co.* 1 W. 219 . . . iii. 527.

7. Where the ship being cast on shore near the port of destination, the agent of the insured employed persons to unlade as much of the cargo (of corn) as could be saved; and nearly one half was landed, dried, and sent on to the port of destination, and sold by the consignees at about one quarter the price of sound corn; this was held not to be a total loss, and the insurer not to be liable. *Ib.*

8. Under a policy on freight of a memorandum article, warranted free from average, &c., the underwriter is not liable, unless there was a destruction in specie of the entire cargo, or unless, if sold at a port of distress, such destruction would have been inevitable, from the sea damage, before it could have arrived at the port of destination. *Hugg v. Augusta Ins. and Banking Co.* 7 H. 595 . . . xvii. 310.

9. Damage to the vessel will not amount to or cause a loss of freight, if the vessel can be repaired, or another procured at the port of necessity, at a reasonable expense, and within a reasonable time, so as to carry the cargo in specie to the port of destination. *Ib.*

10. Of a cargo of a mixed character, no abandonment for mere deterioration in value during the voyage, can be valid, unless the damage on the non-memorandum articles exceed a moiety of the value of the whole cargo, including the memorandum articles. *Marcadier v. Chesapeake Ins. Co.* 8 C. 39 . . . iii. 15.



## 2. ABANDONMENT.

1. If a vessel cannot be repaired for one half her value, at the place of the disaster, when repaired, an abandonment is justifiable. *Patapsco Ins. Co. v. Southgate*, 5 P. 604....ix. 490.

2. There is no particular mode or form of an abandonment. If the assured yields up his right and interest in the subject, it is sufficient, and this may be done by his sending to the underwriter a protest made by the master, containing a clause of abandonment, provided he shows the underwriter his intent to ratify the act of the master. *Ib.*

3. Before an abandonment is accepted, it may be waived by the insured; whether he has waived it is, generally, a question of intention, to be passed on by the jury; and it would not be safe to declare that any act of ownership by the assured, must necessarily be construed into a relinquishment of an abandonment. *Columbian Ins. Co. v. Ashby*, 4 P. 139....ix. 29.

4. The vessel being stranded, and a sale recommended by surveyors, there being a legal cause for an abandonment which had been made, but a part-owner, who was on the spot, not knowing whether it would be accepted or not,—*Held*, that his directing the sale to proceed, did not, *per se*, operate as a waiver of the abandonment. *Ib.*

5. An offer of abandonment having been made in a case where it was justifiable, but neither accepted nor refused, an offer by one professing to act as the agent of the underwriters to pay the expense of getting the vessel off, and putting her in a condition to prosecute her voyage, did not put an end to the abandonment. *Ib.*

6. If an abandonment when made is good, the rights of the parties are fixed. If not then good, subsequent events cannot validate it. *Bradlie v. Maryland Ins. Co.* 12 P. 878....xii. 745.

7. If the cost of the repairs, when made, falls short of one half the value of the vessel, this does not, in all cases, show there was no right of abandonment; for if, when made, the facts presented a case of extreme hazard, and of probable expense exceeding half the value, the abandonment is justified. *Ib.*

8. The value, at the place of repairs, is the standard; the valuation in the policy, or the value at the home port, or in the general market, constitutes no ingredient in ascertaining whether the injury is more than half the value. *Ib.*

9. A retardation of the voyage to repair damages, or because the vessel has been arrested to answer a claim for salvage, does not give a right to abandon; and it makes no difference that the policy is on time. *Ib.*

10. Where there is a complete taking at sea by a belligerent, and his possession continues to the time of the abandonment, there is a constructive total loss which justifies the abandonment, though the property be neutral. *Rhineland v. Ins. Co. of Pennsylvania*, 4 C. 29....ii. 9.

11. The state of the loss at the time of the abandonment fixes the rights of the parties, and the subsequent release of the vessel does not prevent the recovery as for a total loss. *Ib.*

12. The right to abandon depends on the actual state of the loss at the time of the abandonment, not upon the information concerning the loss then in the

possession of the assured. *Marshall v. Delaware Ins. Co.* 4 C. 202.... ii. 70.

13. Though a capture, and possession under it, constitute a technical total loss, and justify an abandonment, yet the right to abandon is terminated by a final decree of restitution, though the decree had not been actually executed when the offer to abandon was made. *Ib.*

14. The seizure of the cargo, the vessel being at liberty to proceed, does not justify an abandonment of the vessel. *Alexander v. Baltimore Ins. Co.* 4 C. 370.... ii. 140.

15. The law fixes no precise time, after notice of the loss, within which an abandonment must be made; but requires it to be made within a reasonable time. *Marine Ins. Co. of Alexandria v. Tucker*, 3 C. 357.... i. 605.

16. The right to abandon may be kept in suspense by mutual consent. *Livingston v. Maryland Ins. Co.* 6 C. 274.... ii. 400.

17. The right to abandon exists during the detention under a capture, but it must be exercised within a reasonable time after notice of the loss. *Chesapeake Ins. Co. v. Stark*, 6 C. 268.... ii. 397.

18. Though a policy requires sixty days' notice of an abandonment, the same letter containing the notice may operate as an abandonment at the end of sixty days. *Columbian Ins. Co. v. Catlett*, 12 W. 383.... vii. 234.

19. Under a policy insuring against "unlawful arrests, restraints, and detentions," the assured cannot abandon on account of restraint of the vessel from entering a blockaded port, the voyage being thereby broken up, because such restraint is not unlawful. *M'Call v. Marine Ins. Co.* 8 C. 59.... iii. 24.

20. A supercargo, after capture, acts for whom it may concern, and if an abandonment be duly made, he is the agent of the insurer. *Chesapeake Ins. Co. v. Stark*, 6 C. 268.... ii. 397.

21. Underwriters upon cargo are not liable to the owner for freight, in case of abandonment. *Caze v. Baltimore Ins. Co.* 7 C. 358.... ii. 569.

22. The right to indemnity for an unjust capture, passes to the underwriter by an abandonment, and to the assignee, on the bankruptcy of the underwriter, under the bankrupt act of April 4, 1800, (2 Stats. at Large, 19.) *Comegys v. Vasse*, 1 P. 193.... vii. 529.

23. *Pro rata* freight is not a charge on salvage money abandoned to the underwriter. *Columbian Ins. Co. v. Catlett*, 12 W. 383.... vii. 234.

24. It is not necessary to aver an abandonment in the declaration. *Ib.*

### 3. PARTIAL.

1. The destruction of part of a cargo, consisting of the same kind of articles, is a partial loss only; not a total loss of such part. *Biays v. Chesapeake Ins. Co.* 7 C. 415.... ii. 600.

2. If the master, at an intermediate port in the course of the voyage under a charter-party, compromises the charter money for a less sum and a release of performance of the residue of the voyage, the underwriters cannot insist that he thereby obtained the freight money for the whole voyage. *Hughes v. Union Ins. Co. of Baltimore*, 8 W. 294.... v. 420.

## 4. GENERAL AVERAGE.

1. The voluntary stranding of a ship, in imminent peril, for the preservation of the crew, the ship, and the cargo, followed by a total loss of the ship, constitutes a case of general average, for which the property saved is bound to contribute. *Columbian Ins. Co. of Alexandria v. Ashby*, 13 P. 331....xiii. 176.

2. A consultation between the master, officers, and crew, though in some cases proper to precede a voluntary sacrifice, is not essential to make a case of general average. *Ib.*

3. Pending freight, contributes and receives, if the vessel be totally lost. *Ib.*

4. If it appeared to the master that his vessel must inevitably be driven on shore, and intentionally, for the better security of the property and persons engaged in the adventure, he gave her a direction to what he supposed to be, and what proved to be, a part of the shore where her stranding would be less injurious and hazardous, and the vessel is totally lost, but the cargo saved, this constitutes a voluntary sacrifice of the vessel, and amounts to a general average loss. *Barnard v. Adams*, 10 H. 270....xviii. 393.

5. Where the vessel is voluntarily stranded and lost, but the cargo is saved and sent to the port of destination by another vessel procured by the master, the average is to be adjusted and the goods valued at that port. *Ib.*

6. If the officers and crew continue to labor for the joint benefit of the adventure in saving and reshipping the cargo after the vessel has been sacrificed, their wages and expenses may be brought into the general average charges. *Ib.*

7. The owners of a vessel are entitled to charge two and one half per cent, upon the amount of the general average charges which the disaster has imposed on them the duty of collecting. *Ib.*

## I. PRELIMINARY PROOF.

*Supra*, E. 3-8; *Infra*, II. 13-15.

## J. PREMIUM, AND HEREIN OF SET-OFF AND LIENS.

LIEN, C.; SET-OFF, D.

A promissory note given for the premium, is a sufficient consideration for the contract of insurance. *Hodgson v. Marine Ins. Co. of Alexandria*, 5 C. 100....ii. 201.

## K. USAGE AND ITS EFFECTS.

1. A policy on goods, to be safely landed at Leghorn, is discharged by landing them at the Lazaretto; that being the place of landing under the usage of the trade. *Gracie v. Marine Ins. Co. of Baltimore*, 8 C. 75....iii. 32.

2. Nor does it vary the case that a part of the cargo remained on board the

ship until the arrival of the French troops, when the departure of the vessel was prohibited by the general, and the ransom made. *Gracie v. Maryland Ins. Co.* 8 C. 84....iii. 35.

3. No acts, justifiable by the usage of the trade, and done by the plaintiffs to avoid confiscation under the laws of Spain, can avoid the policy. *Livingston v. Maryland Ins. Co.* 7 C. 506....ii. 648.

4. Insurers are presumed to know the state and incidents of the trade in which property covered by them is represented to be embarked, and this may include a practice for neutrals to cover belligerent property. *Buck v. Chesapeake Ins. Co.* 1 P. 151....vii. 508.

## II. FIRE INSURANCE.

(MUTUAL INSURANCE; *Supra*, A. D. F.)

1. A person in possession of a mill, under an executory contract of sale, has an insurable interest, even if his vendor has power under the contract to treat the sale as rescinded. *Columbian Ins. Co. v. Lawrence*, 2 P. 25....viii. 10.

2. A policy of insurance against fire, by which a mortgagor's interest is insured, containing a permission to assign the policy to E. R. who was in fact the mortgagee, though not so described in the policy, constitutes "other insurance by the insured on the property hereby insured," within the meaning of the clause concerning prior insurance, in a subsequent policy taken by the mortgagor from another company. *Carpenter v. Providence Washington Ins. Co.* 16 P. 495....xiv. 386.

3. Such prior policy covers the interest of the mortgagor, and not the interest of the mortgagee. *Ib.*

4. The fact that such a prior policy was voidable by the underwriters on account of misrepresentation, does not exempt the insured from the duty of giving notice of it to the underwriters in a subsequent policy, pursuant to the clause respecting prior insurance. *Ib.*

5. A parol notice is not sufficient. *Ib.*

6. The respective rights of underwriter and insured, in case of insurance effected by mortgagors and by mortgagees, considered. *Ib.*

7. It is not the duty of the assured to give information to the insurer, of any fact which the insurer may be presumed to know, unless inquired of; but any unusual practice as to the use of the premises, material to the risk, must be communicated; if not, and such practice is continued, and the risk thereby enhanced, the policy is not valid. *Olark v. Manufacturers' Ins. Co.* 8 H. 235....xvii. 569.

8. A representation that the insured owns a building is not true, if he only had an executory contract to purchase it; and if this misrepresentation was material to the risk, the policy is void. *Columbian Ins. Co. v. Lawrence*, 2 P. 25....viii. 10.

9. Where a rule of an insurance company, touching buildings, provided, "if any person shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium than would otherwise be demanded, such insurance shall be of no force," held, that it

was a question of fact whether the misdescription reduced the premium ; and if it did not, it did not invalidate the policy. *Ib.*

10. When the nature of the interest of the insured in the property might have an influence on the underwriter to enhance the premium, or prevent the contract from being made, it is a question of fact for the jury, whether its non-disclosure was material ; and it was material if they find the underwriter would not have made the contract at all, or only for a higher premium, if he had known the true state of the title. *Columbian Ins. Co. v. Lawrence*, 10 P. 507 . . . . xii. 216.

11. It is not a legal presumption that a misdescription of the premises, material to the risk, did reduce the premium, though it may be proper for the jury to draw the inference. *Ib.*

12. A loss by fire, occasioned by the negligence of the assured or his servants, without fraud or design, is within the policy, and the underwriters are liable. *Ib.*

13. Under a clause in the regulations of an insurance company, requiring the production of a certificate of a magistrate concerning the loss, it was held that it must be produced within a reasonable time ; that the facts and circumstances being admitted, what was reasonable was a question of law, and that in this case five years' delay was accounted for and not unreasonable. *Ib.*

14. The jury cannot find that the underwriter has waived the production of preliminary proof, without other evidence than his omission to specify its non-production as an objection to paying the loss. *Columbian Ins. Co. v. Lawrence*, 2 P. 25 . . . . viii. 10.

15. If a company refuse to issue a policy, saying nothing as to the preliminary proof of loss, they waive its production. *Taylor v. Merchants Fire Ins. Co.* 9 H. 390 . . . . xviii. 191.

## INTEREST.

ADMIRALTY, E.; CONFLICT OF LAWS, J.; CONTRACT, F.; SPECIFIC PERFORMANCE AND RESCISSION, B.

A. ON JUDGMENTS AND DECREES, 259.

B. ON CONTRACTS, 260.

C. OTHER CASES, 261.

### A. ON JUDGMENTS AND DECREES. (PRACTICE, I. E. 3.)

1. The rules of this court allowing interest on judgments and decrees, explained. *Perkins v. Fourniquet*, 14 H. 328 . . . . xx. 201.

2. Interest on affirmance is to be calculated on the aggregate sum of principal and interest in the judgment below, to the time of affirmance, but no further. *Brown v. Van Braam*, 3 D. 344 . . . . i. 254.

3. Interest at the rate of six per cent., from the time the judgment was signed in the circuit court, was allowed in this court as the proper measure of damages on the writ of error. *Mitchell v. Harmony*, 13 H. 115 . . . . xix. 420.

4. Decree in an instance cause affirmed, with damages, at the rate of six per centum per annum, on the amount of the appraised value of the cargo, (the same having been delivered to the claimant on bail,) including interest from the date of the decree of condemnation in the district court. *The Diana*, 3 W. 58 . . . .iv. 163.

5. If the property, ordered to be restored, be sold, interest is not to be paid, unless specially ordered by the decree. *Himeky v. Rose*, 3 C. 313 . . . .ii. 277.

6. Interest or damages cannot be given by a circuit court in execution of a mandate, where the same had not been decreed by this court, on the appeal *Boyce's Executors v. Grundy*, 9 P. 275 . . . .xi. 356.

7. The act of assembly of Kentucky, of the 7th of February, 1812, "giving interest on judgments for damages, in certain cases," applies as well to cases depending in the circuit courts of the Union, as to proceedings in similar cases in the state courts. *Sneed v. Wister*, 8 W. 690 . . . .v. 543.

8. The party is as well entitled to interest in an action on an appeal bond, as if he were to proceed on the judgment, if the judgment be on a contract for the payment of money. He is entitled to interest from the rendition of the original judgment. *Ib.*

#### B. ON CONTRACTS. (*Infra*, C.)

1. The general rule is, that a creditor shall calculate interest to the time when a payment is made; to this interest the payment is first applied, and any excess diminishes the principal; and this rule was applied to a mortgagee in possession, receiving rents. *Story v. Livingston*, 13 P. 359 . . . .xiii. 196.

2. Unliquidated sums, due on contract, bear interest from the time of a judicial demand, by the laws of Louisiana. *Barrow v. Reab*, 9 H. 366 . . . .xviii. 178.

3. Where a bond was given to the United States, to pay a sum of money on a day certain, to their agent in Europe, payment after the day, and mere receipt of such payment without any new agreement, do not destroy the right to interest upon the money during the time the obligor was in default. *United States v. Gurney*, 4 C. 333 . . . .ii. 127.

4. Nor does a special agreement, concerning damages, applicable to non-payment in Europe, affect the right to damages growing out of payment there, after the day. *Ib.*

5. It is not a valid objection to the payment of interest on the purchase-money of wild lands in Florida, after the day when the money became payable, that the Indians have so infested the country that habitation and cultivation became difficult; nor that the title was questioned and proved to be good. *Curtis v. Innerarity*, 6 H. 146 . . . .xvi. 632.

6. The civil law rule, that the vendee is not liable for interest, if he received no profit from the thing purchased, is confined to cases of executory contracts, where the price is payable at a future day, and there is no stipulation as to interest. *Ib.*

C. OTHER CASES. (ADMIRALTY, C. a. 4.

1. If money be enjoined in the hands of a party who is thereby prevented from making any use of it, interest is not allowed. *Osborn v. Bank of the United States*, 9 W. 738....vi. 251.

2. Rests in an account bearing interest, and consisting of numerous items are a proper substitute for computations of interest on each item. *Harding v. Handy*, 11 W. 103....vi. 529.

3. Under the circumstances of this case, it was held that yearly rests in the accounts of trustees were proper. *Barney v. Saunders*, 16 H. 535....xxi. 288.

4. Though the plaintiff cannot recover, by way of principal, a larger sum than is demanded in his count, yet interest may be added, if the *ad damnum* be sufficient to cover it. *Mills v. Bank of the United States*, 11 W. 431....vi. 652.

SHIPPING, F. 3.

INTERNATIONAL LAW.

LAW OF NATIONS.

INTERPLEADER.

1. On a bill of interpleader, the plaintiffs are in general entitled to their costs out of the fund. *Spring v. South Carolina Ins. Co.* 8 W. 268....v. 411.

2. Where the money is not brought into court, they must pay interest upon it. *Ib.*

3. Upon a bill of interpleader, filed by underwriters against the different creditors of an insolvent debtor, who claimed the fund proceeding from an insurance made for account of the debtor, some on the ground of special liens, and others under the assignment, the rights of the respective parties will be determined. *Ib.*

4. But, on such a bill, those of the co-defendants who fail in establishing any right to the fund, are not entitled to an account from the defendant, who shows himself to be the assignee of the policy, of the amount and origin of his claims. *Ib.*

ISSUES.

EQUITY, C. 4

If non-assumpsit be pleaded to an action of tort, and the verdict follows the plea, the judgment must be reversed; for the plea does not put in issue the substance of the declaration. *Garland v. Davis*, 4 H. 131....xvi. 51.



## JAILS.

STATE COURTS, A. 3.

## JEOfAILS.

PRACTICE, II. E.

1. The statute of jeofails (1 Stats. at Large, 91, § 32,) applies to defects in verdicts; and where this court can see from the verdict what was the substantial finding of the jury, and that it covered what was in issue, the judgment will not be reversed by reason of any defect in the form of the verdict. *Parks v. Turner*, 12 H. 39....xix. 18.

2. If no time is laid in a declaration, the defect is cured by a verdict. *Stockton v. Bishop*, 4 H. 155....xvi. 65.

JUDGMENTS, &amp;c. D. 6.

## JETTISON.

Powers of the master, respecting jettisons, stated. *Lawrence v. Minturn*, 17 H. 100....xxi. 392.

## JOINT-TENANTS AND TENANTS IN COMMON.

SEISIN AND DISSEISIN, A.

Where an administrator, who was one of the two heirs of the deceased, in the absence of the other heir, who resided in a distant State, fraudulently suffered land to be sold on execution, and afterwards took a conveyance from the judgment creditor who purchased it, paying him only the amount of the debt, and the creditor paid nothing to the sheriff, and declared, at the time of the purchase, that he only took the land as security.—*Held*, that the creditor might be considered to have been the agent of the administrator, and that, though he was guilty of no fraud, the title acquired from him by the administrator, was invalid at law, as against his co-tenant. *Swayze v. Burke*, 12 P. 11....xii. 611.

EJECTMENT, D. 5.

## JOINT-STOCK COMPANY.

CORPORATIONS; VOLUNTARY ASSOCIATION.

## JUDGMENTS AND DECREES.

APPEAL, A.; BOND, G.; CONFLICT OF LAWS, K.; CONSTITUTIONAL LAW, E.; EQUITY, C. 12; ERROR, B.; EVIDENCE, G.; INJUNCTION, B.; INTEREST, A.; PRACTICE, I. E.

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  - 2. DECREES IN REM.
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- D. OF THE FORM OF JUDGMENTS AND DECREES, THE PRACTICE AS TO THE ENTRY THEREOF, AND CONFORMITY TO THE PREVIOUS ENTRIES ON THE RECORD, 268.
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- A. OF THE CONTROL WHICH A COURT HAS OVER ITS OWN JUDGMENTS AND DECREES WHEN ENTERED.

EXECUTIONS, E.; PRACTICE, I. E. 1.

1. Every court of record has power, at a subsequent term, to amend its records and make them conform to and exhibit the truth. *Sheppard v. Wilson*, 6 H. 260....xvi. 676.

2. A court may at any time reverse an interlocutory decree. *Ogle v. Lee*, 2 C. 33....i. 439.

3. This court has no power to review its decisions; and after the expiration of the term at which a decree is entered, it becomes finally binding and conclusive. *Sibbald v. United States*, 12 P. 488....xii. 811. *Washington Bridge Company v. Stewart*, 3 H. 413....xv. 498.

4. Though the decree of affirmance was by a divided court. *Washington Bridge Company, v. Stewart*, 3 H. 413....xv. 498.

5. But it may correct a clerical mistake in a decree. *Sibbald v. United States*, 12 P. 488....xii. 811.

6. Or reinstate a case dismissed by mistake. *The Palmyra*, 12 W. 1....vii. 1. *Sibbald v. United States*, 12 P. 488....xii. 811.

7. A judgment will not be opened to enable a plaintiff in error to correct an alleged mistake in a bill of exceptions. *Gayler v. Wilder*, 10 H. 477....xviii. 466.

8. A cause having been argued at the last term, a decree made, and a mandate sent, the appellee, not having appeared, at the present term it appearing that the appellee was not cited as required by the act of congress, the decree

was declared void and the mandate revoked. *Ex parte Orenshaw*, 15 P. 119 . . . .xiv. 46.

9. On a petition to alter a mandate, originally issued in a Florida land case, in 1836, and concerning which a further order was made in 1838, asking to have the mandate so changed that the petitioner should be enabled to take the 16,000 acres, to which he was held entitled, out of any ungranted public lands in East Florida ; it was held that the court had no power to grant the relief prayed. *Sibbald v. United States*, 2 H. 455 . . . .xv. 187.

10. After a circuit court has adjourned without day, it cannot set aside one of its own judgments upon motion. *Cameron v. M'Roberts*, 3 W. 591 . . . .iv. 303. *Bank of the United States v. Moss*, 6 H. 31 . . . .xvi. 590.

11. Even for want of jurisdiction over the cause, the judgment is binding till reversed on error. *Bank of the United States v. Moss*, 6 H. 31 . . . .xvi. 590.

12. But a court of equity may set aside a final decree at the same term in which it was rendered. *Doss v. Tyack*, 14 H. 297 . . . .xx. 189.

13. And the circuit court may set aside a judgment of a former term, rendered on default of a defendant who had no notice of the action ; such a judgment being merely void, the court has power summarily to declare it to be inoperative, and to stop all proceedings under it. *Harris v. Hardeman*, 14 H. 334 . . . .xx. 206.

#### COSTS, A. 5.

### B. THE EFFECT OF A JUDGMENT OR DECREE, AND HEREIN OF THE LIENS THEY CREATE AND SALES MADE THEREON.

#### EXECUTIONS, D.

##### 1. LIENS.

1. In those States where a judgment in the state courts creates a lien, a judgment in a court of the United States has that operation throughout the district to which its jurisdiction extends ; and state legislation, modifying the lien of judgments, or restricting their operation, cannot affect the lien of judgments in the courts of the United States. *Massingill v. Downs*, 7 H. 760 . . . .xvii. 392.

2. The lien of judgments in the courts of the United States, depends upon the laws of the State at the time its process acts were adopted by congress, unless congress has further legislated on the subject ; and in Mississippi, a judgment against an administrator does not make a lien on the property of the deceased, if his estate is declared insolvent by the orphans' court subsequently to the judgment. *Williams v. Benedict*, 8 H. 107 . . . .xvii. 515.

3. A statute of Louisiana having provided that all the property of an insolvent debtor shall be deemed vested in his creditors from and after the acceptance of a cession thereof, a judgment recovered in the circuit court of the United States, after that day, gave no lien on land of the debtor, even though it was misdescribed in the schedule of his effects. *Bank of Tennessee v. Horn*, 17 H. 157 . . . .xxi. 427.

4. When three judgments were entered on the same day against a debtor in the circuit court of the United States for Indiana, each of which operated as a lien on land ; *Held*, that the creditor who took out a *ca. sa.* and levied it on the body of the debtor, thus postponed his lien to that of each of the others ;

and that the discharge of the debtor under the insolvent law of Indiana, did not affect the relative priority of these liens. *Rockhill v. Hanna*, 15 H. 189 . . . .xx. 464.

4. Taking the poor debtor's oath, under the act of congress of January 6, 1800, (2 Stats. at Large, 4,) did not revive a judgment lien, nor did a deed of assignment of his property by the debtor to the marshal. *Snead v. M' Coull*, 12 H. 407 . . . .xix. 208.

5. A judgment is a lien on a reversionary estate in land, expectant on the termination of a life-estate. *Burton v. Smith*, 13 P. 464 . . . .xiii. 250.

6. A court of equity will order a reversion, expectant on a life-estate, to be sold, to satisfy the lien of a judgment against a deceased debtor. *Ib.*

7. It is a rule of property in Maryland, that a judgment is, *per se*, a lien on land of the debtor. *Taylor v. Thompson's Lessee*, 5 P. 358 . . . .ix. 379.

8. A prior judgment lien, during the time fixed by law for its existence, is not displaced by delay and a levy under a subsequent judgment lien. *Rankin v. Scott*, 12 W. 177 . . . .vii. 104.

9. Under the law of Mississippi, a forthcoming bond is substituted, as a security, in place of the lien acquired by the judgment and seizure on execution; and if another judgment is recovered by a third person after the taking of such a bond, and before its breach, the second judgment creates the prior lien on the property of the debtor. *Brown v. Clarke*, 4 H. 4 . . . .xvi. 8.

10. *Aliter*, if the bond be void. *Ib.*

#### PRACTICE, II. H. 8.

#### 2. DECREES IN REM.

1. The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and works an absolute change of the property. *Williams v. Armroyd*, 7 C. 423 . . . .ii. 603.

2. A sentence of condemnation completely extinguishes the title of the original proprietor, and transfers a rightful title to the captor or his sovereign. *The Star*, 3 W. 78 . . . .iv. 175.

3. The act of June 26, 1812, § 5, (2 Stats. at Large, 760,) has not changed this principle of law in respect to vessels belonging to citizens, captured from an enemy after condemnation. Such a vessel must be condemned as enemies' property, and not restored to the former owner on payment of salvage. *Ib.*

4. Whoever claims under a sentence of condemnation, must show that the sentence was pronounced by a court having jurisdiction for that purpose. *La Nereyda*, 8 W. 108 . . . .v. 374.

5. If the sentence was by a court foreign to the captors, it must appear that the jurisdiction was invoked by them. *Ib.*

#### BANKRUPT LAWS, D. 5; LAW OF NATIONS, B. 22.

#### 3. OTHER MATTERS. (EVIDENCE, G. 1.)

1. A judgment or decree of a court of competent jurisdiction is conclusive wherever the same matter is again brought in controversy. *Hopkins v. Lee*, 6 W. 109 . . . .v. 26. *Bank of the United States v. Beverly*, 1 H. 134 . . . .xiv. 533.

2. But the rule does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree. *Hopkins v. Lee*, 6 W. 109....v. 26.

3. If the validity of a mortgage be tried and adjudicated in a suit in chancery, the decree binds parties and privies in an action of ejectment founded on the same mortgage. *Smith v. Kernochen*, 7 H. 198....xvii. 90.

4. Though the occupying claimant law of Kentucky was held, by this court, invalid as against a plaintiff in ejectment, (8 W. 1,) yet if he suffers a judgment to be rendered against him for the value of the improvements, and third persons give their bond for the amount, upon which execution issues against them, they cannot avail themselves of the invalidity of that law. *M'Kinney v. Carroll*, 12 P. 66....xii. 630.

5. A decree in chancery, for the distribution of a common fund among those interested, does not conclude one who was not a party to the decree, and who was guilty of no laches. It protects the trustee who makes distribution pursuant to it; but the fund may still be followed, and his just portion reclaimed, by one not a party, nor negligent. *Williams v. Gibbes*, 17 H. 239....xxi. 479. *Gooding v. Oliver*, 17 H. 274....xxi. 504.

6. The effect of a decree of the court of appeals of Maryland, concerning the fund here in controversy, examined, and declared. *Ib. Ib.*

7. The parties to a real action in the supreme judicial court of Massachusetts, agreed on a statement of facts, and that the court might order a nonsuit or default and enter judgment thereon. *Held*, 1. That a nonsuit was not a bar. 2. That the agreement was not an estoppel to sue again. 3. That, upon the construction of a will on which the title depended, the demandant was entitled to recover. *Homer v. Brown*, 16 H. 354....xxi. 182.

8. A bill dismissed at the rules, on motion of the complainant, is no bar to a subsequent bill. *Walden v. Bodley*, 14 P. 156....xiii. 400.

9. A decree of a court of equity declaring that the complainant is the equitable owner of land, and ordering the defendant to convey it, though in part executed by a writ of *habere facias*, putting the complainant in possession, does not confer a legal title, and is not a bar to an action of ejectment. *Hickey's Lessee v. Stewart*, 3 H. 750....xv. 627.

10. A decree, made in the high court of chancery in England, in a suit wherein an administrator appointed there is a complainant, and an executor qualified there is defendant, does not estop an administrator appointed in Pennsylvania, from suing the same executor qualified in Pennsylvania, upon the same title asserted in the English bill, the subject-matter of the first suit being assets in England, and of the second suit, assets in Pennsylvania. *Aspden v. Nixon*, 4 H. 467....xvi. 180.

11. A judgment against one joint debtor, in an action of assumpsit, cannot be pleaded in bar by the other alone, in an action against both, founded on the original promise of both. *Sheehy v. Mandeville*, 6 C. 253....ii. 391.

12. The sentence of a foreign court of admiralty, condemning a vessel, for breach of blockade, is conclusive evidence of that fact, in an action on the policy of insurance. *Croudson v. Leonard*, 4 C. 434....ii. 163.

13. A judgment against the person to be indemnified, fairly recovered, is

admissible, in a suit on the contract of indemnity. *Clark's Executors v. Carrington*, 7 C. 308....ii. 546.

14. A judgment at law against an administrator is evidence of the existence of the debt against the surety of the administrator and the fraudulent grantee of the intestate. *McLaughlin v. Bank of Potomac*, 7 H. 220....xvii. 97.

15. A verdict and judgment that the mother was born free, is not conclusive evidence of the freedom of her children, unless between the same parties or privies. *Wood v. Davis*, 7 C. 271....ii. 525.

16. A decree of this court, made in a suit which is proved not to have been a real controversy, is not admissible in evidence against third persons. *Gaines v. Relf*, 12 H. 472....xix. 254.

17. Under the laws of Ohio, if a judgment be rendered upon regular proceedings against an absent debtor, and land attached be ordered to be sold to satisfy the judgment, and the sale on being reported to the court, is confirmed, and a conveyance is made, the title of the debtor passes to the grantee, although the record does not show that the other requirements of the statute were complied with. *Voorhees v. Bank of the United States*, 10 P. 449....xii. 198.

18. The judgment of confirmation raises a presumption conclusive, while that judgment stands unreversed, that whatever was necessary to its legality was proved and found by the court, and it cannot be impeached collaterally. *Ib.*

19. It is no objection that the deed was made to a third person by direction of the purchaser. *Ib.*

20. In Virginia, a confession of judgment is a release of errors. *Mandeville v. Holey*, 1 P. 136....vii. 499.

21. A clause in a judgment, "subject to the legal operation of the defendant's discharge under the insolvent laws of Maryland," does not operate as an admission by the plaintiffs of their validity, or give to them, by consent, any effect. *Boyle v. Zacharie*, 6 P. 635....x. 291.

22. Under the act of May 8, 1830, (4 Stats. at Large, 899,) authorizing the superior court of the territory of Arkansas to entertain a bill of review, to revise certain decrees — *Held*, 1. That the original decree, being made in a suit in which the sole complainant was a fictitious person, was a mere nullity. *Sampeyreac v. United States*, 7 P. 222....x. 458.

23. 2. That the act giving the new remedy by bill of review, was constitutional. *Ib.*

24. 3. That congress had power to mould this remedy and dispense with technical rules concerning bills of review. *Ib.*

25. 4. That, as the original complainant was fictitious, a forged deed in that name gave no title, and the purchaser, from the grantee on that deed, acquired no title which a court of equity could protect. *Ib.*

## INSOLVENT LAWS, A. 2.

### C. DISCHARGE AND SATISFACTION OF.

#### EXECUTIONS, D.

D. OF THE FORM OF JUDGMENTS AND DECREES, THE PRACTICE AS TO THE ENTRY THEREOF, AND CONFORMITY TO THE PREVIOUS ENTRIES ON THE RECORD.

BILLS, &c. G. 4; ISSUES; PRACTICE, I. E. 1, II. E. 2; WAIVER.

1. The proper judgment for the defendant on a plea of the statute of limitations, is, that the plaintiff take nothing by his writ. *Bank of the United States v. Donally*, 8 P. 361....xi. 127.

2. If a deed is void at law, upon its face, and a bill to have it cancelled is dismissed, the decree ought to show that the court finds no equitable circumstances to induce it to interfere, and should not give costs. *Peirsoll v. Elliott*, 6 P. 95....x. 42.

3. The act of signing a judgment is ministerial, and a *mandamus* was issued requiring the judge to do it. *Life and Fire Ins. Co. of New York v. Wilson's Heirs*, 8 P. 291....xi. 106.

4. An entry, that "judgment was entered for the plaintiff on said second count," following a verdict for the plaintiff on both counts, will authorize an execution. *Stockton v. Bishop*, 4 H. 155....xvi. 65.

5. A question of fact as to the basis of a judgment, and the agreement under which it was recovered. *Gear v. Parish*, 5 H. 168....xvi. 347.

6. An omission to enter a formal judgment on one of two pleas, which was demurred to, and which showed no defence, is cured by the statute of jeofails, (1 Stats. at Large, 91, § 32.) *Morsell v. Hall*, 13 H. 212....xix. 464.

7. Where a declaration contained several counts, and, on a plea of the general issue to all, a verdict was found for the plaintiff; and upon a special plea to part of the counts, and a replication thereto, a demurrer was taken but not joined, and no judgment was entered on the demurrer; and, by the law of the State where the trial was had, one good count was sufficient to support a judgment, it was held, that a judgment for the plaintiff was not erroneous. *Townsend v. Jemison*, 7 H. 706....xvii. 361.

8. Motion by the plaintiff for leave to amend, after a plea in abatement, and an order granting leave, disposes of the plea, and, as the defendant appeared only to plead in abatement, he is then out of court, and judgment by default against him is regular, if he do not again appear. *Randolph v. Barrett*, 16 P. 138....xiv. 216.

9. If the record shows two pleas, and an issue and verdict for defendant on one, and no issue on the other, a judgment for the defendant is not erroneous. *Dufau v. Coupney's Heirs*, 6 P. 170....x. 82.

10. The demand in a petition being only \$15,000, a judgment for \$20,000 is erroneous. *Cox v. United States*, 6 P. 172....x. 83.

11. Where an agreement to confess judgment to foreclose a mortgage appeared on file, and a state court, at a subsequent term, granted leave to enter a judgment *nunc pro tunc*, no other court can revise this exercise of discretion. *Slacer v. Bank of Pittsburg*, 16 H. 571....xxi. 801.

PLEADING, C. 7.



## E. EQUITABLE RELIEF AGAINST, OR TO ENFORCE A JUDGMENT.

## AUDITA QUERELA; EQUITY, B. b. 1.

1. A bill to enjoin a judgment, which shows that the complainant had a good defence at law to a considerable part of the claim, but was ignorant thereof, without laches, and that there was a combination between the defendants to deprive him of his right of offset, is not demurrable. *Davis v. Tileston*, 6 H. 114....xvi. 621.

2. A court of equity does not interfere with judgments at law, unless the complainant had an equitable defence, of which he could not avail himself at law, because it did not amount to a legal defence, or had a good defence at law, which he was prevented from availing himself of by fraud, or accident, unmixed with negligence of himself or his agents. *Hendrickson v. Hinckley*, 17 H. 443....xxi. 601.

3. And will not relieve against a judgment at law, where the defendant had a legal defence, which he omitted to set up, and does not satisfactorily account for such omission. *Sample v. Barnes*, 14 H. 70....xx. 40.

4. Nor will it relieve where the defence is, that the contract on which the judgment rests, was made in violation of a statute. *Ib.*

5. And if a bill to enjoin a judgment shows no sufficient reason why the defence was not made at law, it must be dismissed. *Creath's Administrator v. Sims*, 5 H. 192....xvi. 353.

6. Equity will not relieve the defendant from a judgment at law, recovered after he appeared and pleaded, on the ground that the marshal made a false return. *Walker v. Robbins*, 14 H. 584....xx. 352.

7. It is not cause for enjoining a judgment at law that it was recovered for the consideration of a sale, and that the complainant apprehends a failure of title of the vendor, he still being in possession. *Truly v. Wanzer*, 5 H. 141....xvi. 339.

8. A complainant who asks the aid of a court of equity to enforce a judgment at law must show that the occasion for this aid is not his own laches, and if laches appear on the face of the bill, the defendant may take advantage of it by demurrer. *Maxwell v. Kennedy*, 8 H. 210....xvii. 560.

9. A court of equity will not give a remedy against the personal assets of a deceased surety, when the remedy at law has been lost by the election of the obligee to take a joint judgment on a joint and several obligation. *United States v. Price*, 9 H. 83....xviii. 41.

## DISCOVERY, 4.

## F. ACTIONS ON.

1. An action of debt lies in the circuit court for Maryland, founded on a decree for the payment of money made by a court of equity, of general jurisdiction, in the State of New York. *Pennington v. Gibson*, 16 H. 65....xxi. 30.

2. An action on a judgment against two defendants is not maintainable.

against one alone, both being alive and within the jurisdiction; and if the judgment appear by the declaration to be joint, and no excuse is stated for the non-joinder of the other debtor, the declaration is bad on demurrer. *Gilman v Rives*, 10 P. 298....xii. 130.

DEBT, C. 3.

**G. HOW JUDGMENTS MAY BE ATTACKED, AND HEREIN OF SUCH AS WERE WITHOUT JURISDICTION, OR RECOVERED BY FRAUD.**

**JURISDICTION, I**

1. If a judgment be set up in a collateral action, against a party who had not opportunity to plead to the action in which it was recovered, because no notice was given to him of its pendency, it may be avoided by proof of fraud, or may be shown to be void on its face. *Webster v. Reid*, 11 H. 437....xviii. 678.

2. A judgment of a court of the United States, though voidable for error, cannot be impeached collaterally; it is valid and binding until reversed by a writ of error. *Huff v. Hutchinson*, 14 H. 586....xx. 354.

**JUDICIAL POWER.**

CONSTITUTIONAL LAW, D. COURTS OF THE UNITED STATES; JURISDICTION  
LAW OF NATIONS, B; PRACTICE; STATE COURTS AND MAGISTRATES.

**JUDICIAL SALES.**

EXECUTION, D.; JUDGMENTS AND DECREES, B.; SALES, E.

**JURISDICTION.**

ADMIRALTY, A.; BANKRUPT LAWS, D.; CONSTITUTIONAL LAW, B.; COURTS OF  
THE UNITED STATES; EQUITY, A.; INSOLVENT LAWS, B.; LAW OF NA-  
TIONS, B.; STATE COURTS AND MAGISTRATES; STATES, A.

**A. SUPREME COURT, 272.**

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**b. APPELLATE JURISDICTION, HOW EXERCISED AND REGULATED GEN-  
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JUDICIARY ACT OF 1789, (1 STATS. AT LARGE, 86.)**

**1. TO WHAT COURT.**

**2. FORM, &c. OF WRIT.**

**3. WHAT QUESTIONS, HOW DECIDED, JUDGMENT OR DECREE FINAL,  
AND ITS AMOUNT.**

**4. WHAT MUST APPEAR IN THE RECORD.**

**5. HOW THIS JURISDICTION EXERCISED, AND WHETHER CONSTITUTIONAL.**

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**2. FINALITY OF JUDGMENT OR DECREE.**

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**4. CERTIFICATES OF DIVISION OF OPINION UNDER THE ACT OF APRIL 29, 1802, § 6, (2 STATS. AT LARGE, 159.)**

**5. HABEAS CORPUS AND MANDAMUS.**

**6. GENERALLY.**

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**f. APPELLATE FROM COURTS OF TERRITORIES AND THE DISTRICT OF COLUMBIA.**

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**3. CITIZENS OF DIFFERENT STATES, AND HEREIN OF CORPORATIONS.**

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**b. FROM THE SUBJECT MATTER.**

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**2. CRIMES UNDER LAWS OF THE UNITED STATES.**

**3. OFFENCES AT COMMON LAW.**

**4. LANDS CLAIMED UNDER DIFFERENT STATES.**

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**F. WHAT IS JURISDICTION, AND OF ITS TERRITORIAL EXTENT, 298**

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**L HOW, WHEN, AND BY WHOM A WANT OF JURISDICTION MAY OR MAY NOT BE SHOWN, AND OF ITS CONSEQUENCES WHEN SHOWN, 802.**

**A. SUPREME COURT.**

**a. ORIGINAL JURISDICTION.**

**AMBASSADOR ; EQUITY, C. 9 ; HABEAS CORPUS ; MANDAMUS ; STATES, A.**

1. It is settled that this court may exercise its jurisdiction in suits against a State, under the authority conferred by the constitution and existing acts of congress. *New Jersey v. New York*, 5 P. 284 . . . ix. 343.

2. The kinds of process, the persons on whom it is to be served, and the course of the court on the failure of the State to appear, are also prescribed. *Ib.*

3. So it has jurisdiction of a suit in equity, brought by one State against another State, to determine a question of disputed boundary. *Rhode Island v. Massachusetts*, 12 P. 657 . . . xii. 883.

4. Under the Constitution of the United States, as originally adopted, a State could be sued by an individual citizen of another State. *Chisholm v. Georgia*, 2 D. 419 . . . i. 16.

5. The eleventh amendment of the constitution deprived this court of jurisdiction over suits against a State by citizens of another State ; and suits pending at the time of its adoption can be no further prosecuted. *Hollingsworth v. Virginia*, 3 D. 378 . . . i. 266.

6. The fact that the land demanded in a suit was granted by and is claimed under a State, does not make the State a party to the suit, within the meaning of the second section of the third article of the constitution. *Fowler v. Lindsey*. *Fowler v. Miller*, 3 D. 411 . . . i. 291.

7. Nor does an issue upon the point whether the land demanded is within the limits of the State. *Ib.*

8. A bill of complaint allowed to be filed against the State of Georgia, and process of subpoena awarded. *Florida v. Georgia*, 11 H. 293 . . . xviii. 628.

9. An Indian tribe, or nation, within the United States, is not a "foreign state," within the meaning of the 2d section of the third article of the constitution, and cannot sue in the courts of the United States. *Cherokee Nation v. Georgia*, 5 P. 1 . . . ix. 178.

10. Congress cannot confer on this court any original jurisdiction. *Marbury v. Madison*, 1 C. 137 . . . i. 368.

11. To issue a writ of mandamus, requiring a secretary of state to deliver a paper, would be an exercise of original jurisdiction not conferable by congress, and not conferred by the constitution on this court. *Ib.*

12. The 13th section of the judiciary act, (1 Stats. at Large, 81,) is inoperative, so far as it attempts to grant to this court power to issue writs of mandamus, in classes of cases of original jurisdiction, not conferred by the constitution on this court. *Ib.*

13. This court has not original jurisdiction of a petition for a *habeas corpus* by an alien who is a private person. *Ex parte Barry*, 2 H. 65 . . . xv. 34.

**b. APPELLATE JURISDICTION HOW EXERCISED AND REGULATED GENERALLY.**

1. This court will not take cognizance of any suit, or controversy not brought before them by regular process of law. *Dewhurst v Coulthard*, 3 D. 409.... i. 290.

2. An appellate jurisdiction can be exercised by this court only in conformity with such regulations as congress prescribes. *Wiscart v. Dauchy*, 3 D. 321....i. 240.

3. The affirmative description of the appellate power of the supreme court, contained in the judiciary act, implies a negative on the exercise of such appellate power as is not comprehended within it. *Durousseau v. United States*, 6 C. 307....ii. 412.

4. But it is not necessary the appellate jurisdiction should be expressly given by an act of congress ; it is enough, if an intent to allow it to exist, under the constitution, in a particular case, can be ascertained. *Ib.*

5. An appeal from the district court of the district of Maine, in a case of admiralty jurisdiction, does not lie directly to the supreme court of the United States, but to the circuit court for the district of Massachusetts. *Sloop Sally v. United States*, 5 C. 372....ii. 299.

6. The removal of suits from the circuit court into the supreme court must be by writ of error in every case, whatever may be the original nature of the suits. *Blaine v. Ship Charles Carter*, 4 D. 22....i. 319.

**c. WRITS OF ERROR TO STATE COURTS UNDER THE 26TH SECTION OF THE JUDICIARY ACT OF 1789. (1 STAT. AT LARGE, 85.)**

**1. WHAT COURT.**

1. The judgment to be examined must be that of the highest court of the State having cognizance of the case, but the record of that judgment may be brought from any court, in which it may be legally deposited, and in which it may be found by the writ. *Gelston v. Hoyt*, 3 W. 246....iv. 211.

2. The superior court of Rhode Island is the highest court of law of that State within the meaning of that section. *Olney v. Arnold*, 3 D. 308....i. 235.

**2. FORM, &c. OF WRIT.**

**ERROR, A. ; PRACTICE, I. A.**

**3. WHAT QUESTIONS, HOW DECIDED, JUDGMENT OR DECREE FINAL, AND ITS AMOUNT.**

**APPEAL, A. ; CONSTITUTIONAL LAW, D. 2 ; ERROR, B.**

1. This section extends the jurisdiction of this court to rights protected by the constitution, treaties, or laws of the United States, from whatever source those rights may spring. *City of New Orleans v. De Armas*, 9 P. 228... xi. 338.

2. This court cannot reëxamine the decision of a state court, that a law of a territory was not repugnant to the constitution of the United States. *Miners' Bank of Dubuque v. Iowa*, 12 H. 1....xix. 1.

3. Nor try the question, whether the political body, which passed a particular law, was a "State," for it is only a statute of a "State," which can be thus reëxamined. *Scott v. Jones*, 5 H. 343....xvi. 420.

4. And where a state law is admitted to be valid, and the only question is whether it has been correctly construed, this court has not jurisdiction. *Commercial Bank of Cincinnati v. Buckingham's Executors*, 5 H. 317....xvi. 416.

5. Nor can it inquire whether an oppressive use has been made of the right of eminent domain by the authorities of a county, under a law of a State, so as to impair the rights of an owner of land under a patent. *Mills v. St. Clair County*, 8 H. 569....xvii. 707.

6. Where the question is, whether a title was protected by a treaty, it has power to determine upon the validity of the title. *Martin v. Hunter's Lessee*, 1 W. 304....iii. 562.

7. The construction of a treaty is drawn in question when the inquiry is whether, under the laws of a State, such a title existed as the treaty protects, although the only difficulty of that inquiry consists in the interpretation of the state laws and their application to the case. *Smith v. Maryland*, 6 C. 286....ii. 409.

8. In such a case, the supreme court has jurisdiction. *Ib.*

9. If a defendant in ejectment set up an outstanding title in a third person, under whom he does not claim, and the validity of this title depends upon the effect of a treaty, this is not "a case arising under a treaty," of which this court has jurisdiction. *Owings v. Norwood's Lessee*, 5 C. 344....ii. 288.

10. An outstanding title in a third person, alleged to have been derived under a treaty, set up by the defendant to defeat an action of ejectment, in a state court, will not enable him to have a writ of error; to give jurisdiction to this court, the party must claim the right for himself, and not for a third person in whose title he has no interest. *Henderson v. Tennessee*, 10 H. 311....xviii. 405.

11. The treaty between the United States and France for the acquisition of Louisiana, confirmed titles as they existed under the local law; and the decision of the supreme court of Louisiana, upon a question of boundary of one of the grants made before the treaty, cannot be considered as denying a title claimed under a treaty, but only as applying that title, whose existence is admitted, to the land; and, consequently, this court has not jurisdiction. *McDonogh v. Millaudon*, 3 H. 693....xv. 604.

12. And the same view is applicable to a confirmation of a French title by commissioners, under an act of congress, not by specific metes and bounds; they confirmed it as it existed, and it is for the local tribunals to ascertain its bounds. *Ib.*

13. Though this court has not jurisdiction to examine a perfect Spanish title, and decide whether the state court had given due effect thereto, yet if an imperfect Spanish title has been acted on by congress, and this court is called on to review the decision of a state court upon such statute title, this court

must examine the Spanish title, for the purpose of ascertaining what effect the act of congress had thereon. *Chouteau v. Eckhart*, 2 H. 844....xv. 186.

14. If both parties assert title under an act of congress, this court has jurisdiction. *Matthews v. Zane*, 4 C. 882....ii. 148; *Buel v. Van Ness*, 8 W. 312....v. 428; *Ross v. Barland*, 1 P. 655....vii. 752.

15. It has not jurisdiction to reëxamine the decision of a state court concerning a right to freedom, not claimed under any act of congress, &c. *Lagrange v. Chouteau*, 4 P. 287....ix. 72.

16. The supreme court of Missouri having held the defendant in error entitled to her freedom under the ordinance of 1787, for the government of the northwestern territory, (1 Stats. at Large, 51,) this court has not jurisdiction of a writ of error by her claimant. *Menard v. Aspasia*, 5 P. 505....ix. 446.

17. A defence founded on the allegation that the defendant's conduct was in fraud of an act of congress, is not a matter which this court can reëxamine at his instance. *Udell v. Davidson*, 7 H. 769....xvii. 396; *Walworth v. Kneeland*, 15 H. 348....xx. 555.

18. Where the record shows that the state court might have disposed of the case, and for aught that appears did decide it, without deciding any question under an act of congress against the plaintiff in error, this court has no jurisdiction. *Ocean Insurance Company v. Polleys*, 13 P. 157....xiii. 104.

19. When a writ of error brings up a record from a state court, and it is suggested that that court may have determined the cause upon some question of local law, and it does not appear by any clear intendment from the record, whether it was so determined or not, this court will examine that question, and see if the state court could have rightfully so determined. *Gelston v. Hoyt*, 3 W. 246....iv. 211.

20. The question whether the local law annexed the right to alluvion to a certain tract of land, or how it divided the increment between the owners of two tracts, is not one of those matters which this court can reëxamine, even if the losing party claimed the upland and its legal appurtenances under an act of congress. It belongs to the local law to determine what those legal appurtenances are. *Kennedy's Executors v. Hunt's Lessee*, 7 H. 586....xvii. 305.

21. This court cannot reëxamine the decision of a state court upon a question of boundary between coterminous proprietors of lands, depending on the local laws. *Almonester v. Kenton*, 9 H. 1....xviii. 1; *Doe v. City of Mobile*, 9 H. 451....xviii. 224.

22. In an action of slander of title in Louisiana, the state court having determined that the true line between the parties excluded the defendant from the land in question, he cannot have a writ of error, because the court went on to express an opinion concerning the title of the plaintiff, and declared that he had a good title under an act of congress, and enjoined the defendant from selling the land. *Almonester v. Kenton*, 9 H. 1....xviii. 1.

23. Where a title founded on a French grant, made in 1759, was confirmed by congress under the act of May 8, 1822, (3 Stats. at Large, 699,) and another title founded on a Spanish grant made in 1788, under which possession had been held, also confirmed by the same act, came in conflict, and the state court held that both parties stood on equal ground under the act of congress, and that it was necessary to resort to the antecedent condition of the titles to



decide between them, and thereupon decided that, under the local laws and regulations, the junior grant, with possession, must prevail, this court cannot re-examine that decision. *Doe v. Eslava*, 9 H. 421 . . . . xviii. 208.

24. As this court has not jurisdiction to revise the decision of a state court upon a mere question of conflicting boundaries, so it cannot reëxamine its decisions on the admissibility of evidence bearing on such question of boundary; but when evidence admitted for that purpose has been allowed an effect upon a question of title arising under an act of congress, this court has such jurisdiction. *Mackay v. Dillon*, 4 H. 421 . . . . xvi. 165.

25. The question whether slaves, held in Kentucky, are made free by going into Ohio, with the permission of their master, is purely a question of local law, over which this court cannot take jurisdiction under a writ of error to the court of appeals of the State of Kentucky. *Strader v. Graham*, 10 H. 82 . . . . xviii. 305.

26. A question whether the rights of the insolvent, under a contract, passed to his assignee, under the insolvent laws of the State, cannot be reviewed by this court, though the grounds of the question were that the contract was invalid as made in violation of the neutrality laws of the United States, and the rights of the insolvent had been provided for by a treaty between the United States and Mexico. *Gill v. Oliver's Executors*, 11 H. 529 . . . . xviii. 703.

27. Where two persons had preëmption rights by settlement on the same quarter section, and instead of proceeding to obtain titles in severalty, elected to take a patent as tenants in common, not designating in what proportion each was to own the land, this court cannot review the decision of a state court making partition between them. *Downes v. Scott*, 4 H. 500 . . . . xvi. 186.

28. This court cannot reëxamine the decision of a state court upon the question whether a party was lawfully held as a slave in Missouri at the time of the treaty of cession of Louisiana. *Ohoteau v. Marguerite*, 12 P. 507 . . . . xii. 824.

29. If the highest court of a State dismissed a writ of error because the plaintiff failed to produce a transcript of the record of the court below, this court has not jurisdiction. *Matheson v. Branch Bank of Mobile*, 7 H. 260 . . . . xvii. 109.

30. It cannot examine the question whether one decree of a state court is in collision with another decree of the same court, in two suits concerning the same subject-matter. *Mitchell v. Lenox*, 14 P. 49 . . . . xiii. 340.

31. Suit dismissed, as not presenting any question of which this court could take jurisdiction. *Maney v. Porter*, 4 H. 55 . . . . xvi. 19.

32. This court cannot reëxamine the decision of a state court allowing an action on a marshal's bond in the name of the person injured. *Montgomery v. Hernandez*, 12 W. 129 . . . . vii. 81.

33. This court cannot reëxamine the decision of a state court upon a question whether a person claiming under an invalid deed has a right to redeem land under the law of Pennsylvania, though that invalid deed was given on a sale for taxes under the laws of the United States. *M'Bride v. Hoey*, 11 P. 167 . . . . xii. 388.

34. It has not jurisdiction to revise the decision of a state court, upon a question whether a survey, under the authority of the United States, operated

as an eviction of a grantee of a private person, so as to enable the grantee to sue his grantor. *Keene v. Clark*, 10 P. 291 . . . . xii. 125.

35. It cannot declare an act of a state legislature void because it conflicts with the constitution of the State. *Jackson v. Lamphire*, 3 P. 280 . . . . viii. 419.

36. And has not jurisdiction of a writ of error to a state court, to revise its decision upon a writ of *habeas corpus*, remanding a prisoner to the custody of the sheriff, to be delivered, under a warrant from the governor of the State, to the authorities of a foreign country, to be there tried for an alleged murder. *Holmes v. Jennison*, 14 P. 540 . . . . xiii. 649.

37. The question whether a person, appointed a trustee of a banking corporation, under the authority of a statute of a state, has power to sue on a note held by the bank, after he has collected enough to pay its debts, cannot be brought to this court. *Robertson v. Coulter*, 16 H. 106 . . . . xxi. 45.

38. A suit in equity being brought to this court by a writ of error to the highest court of a state upon the ground that the state court had decided against a title claimed under laws of the United States, this court can examine only that title, and cannot consider any distinct equity arising out of contracts or transactions between the parties. *Matthews v. Zane*, 7 H. 164 . . . . v. 244.

39. This court has jurisdiction, where one party claims land under a grant from the State of New Hampshire, and the other under a grant from the State of Vermont, although, at the time of the first grant, Vermont was part of New Hampshire. *Town of Pawlet v. Clark*, 9 C. 292 . . . . iii. 358.

40. On a writ of error to a state court, the record of which was understood to show that the character of consul-general of the king of Saxony did not exempt the defendant from being sued in the state court, the judgment was reversed. *Davis v. Packard*, 7 P. 276 . . . . x. 486.

41. This is not a mere personal privilege. It is a privilege of the foreign sovereign, that his representative shall be sued only in the courts of the United States, with which government alone he has relations; and it is not waived by an omission to plead it to the action. *Ib.*

42. It is not sufficient that one of the questions mentioned in the 25th section was involved in the cause, and might have been decided; it must appear either in terms, or by necessary intendment, that it was decided, and against the right claimed. *Coon v. Gallagher*, 15 P. 18 . . . . xiv. 8.

43. It is not every misconstruction of an act of congress which can be reëxamined; the decision must have been against some right, &c., so claimed under such an act. *Montgomery v. Hernandez*, 12 W. 129 . . . . vii. 81.

44. If the judgment of an inferior court of a State, against a title claimed under an act of congress, is affirmed by a divided court above, a writ of error lies. *Lessieur v. Price*, 12 H. 59 . . . . xix. 31.

45. If the highest court of a State in fact decides against the plaintiff, one of the questions enumerated, a writ of error lies, although it may have disregarded one of its own rules of practice in making a decision. *Darrington v. State Bank of Alabama*, 13 H. 12 . . . . xix. 357.

46. If a state court decree in favor of a right claimed under the act of congress, this court has not jurisdiction. *Gordon v. Caldcleugh*, 3 C. 268 . . . . i.

576. *Fulton v. M'Affee*, 16 P. 149....xiv. 221. *Strader v. Baldwin*, 9 H. 261....xviii. 135. *Linton v. Stanton*, 12 H. 423....xix. 222.

47. Although proceedings and acts under another act of congress were relied on to show fraud in the title of the plaintiff, and the state court denied all such effect to those proceedings. *Fulton v. M'Affee*, 16 P. 149....xiv. 221.

48. Nor if the decision of the state court be against the validity of the state law, drawn in question as repugnant to the constitution of the United States. *Commonwealth Bank of Kentucky, v. Griffith*, 14 P. 56....xiii. 343. *Walker v. Taylor*, 5 H. 64....xvi. 302.

49. A writ of error to a state court lies, where the plaintiff in error claimed title under sale by a marshal of the United States upon process from a court of the United States, and the decision was against that title. *Collier v. Stanbrough*, 6 H. 14....xvi. 585.

50. Where land is claimed under an authority alleged to have been exercised by the secretary of the treasury in behalf of the United States, and the decision is against the validity of such authority, this court has jurisdiction. *Neilson v. Lagow*, 7 H. 772....xvii. 399.

51. Also, where the state court decided that a title to land under a deed was preferable to a title under a lien by a judgment of a circuit court of the United States. *Clements v. Berry*, 11 H. 398....xviii. 660.

52. Where the plaintiff claimed the right to remove a case from a court of the State, to a court of the United States, under the 12th section of that act, and his application was refused by the state court, a writ of error lies. *Kanouse v. Martin*, 14 H. 23....xx. 12.

53. The court has no jurisdiction under the 25th section of the judiciary act, unless the judgment or decree of the state court be a final judgment or decree. A judgment, reversing that of an inferior court, and awarding a *venire facias de novo*, is not a final judgment. *Houston v. Moore*, 3 W. 438....iv. 252.

54. A judgment of the highest court of a State in a proceeding for a prohibition, is a "final" judgment in a "suit" under that section. *Weston v. City Council of Charleston*, 2 P. 449....viii. 171.

55. A decree of the highest court of equity of a State, affirming the decretal order of an inferior court of equity of the same State, refusing to dissolve an injunction granted on the filing of the bill, is not a final decree within that section from which an appeal lies to this court. *Gibbons v. Ogden*, 6 W. 448....v. 120.

56. The amount of the judgment is not material, under the 25th section of the judiciary act. *Buel v. Van Ness*, 8 W. 312....v. 428.

57. When the demand in the declaration is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court, and of the circuit courts, is to allow the value to be given in evidence. *Ex parte Bradstreet*, 7 P. 634....x. 604.

#### 4. WHAT MUST APPEAR IN THE RECORD. (RECORD.)

1. To give this court jurisdiction under the 25th section of the judiciary act, it must appear on the record itself to be one of the cases enumerated in that section; and nothing out of the record certified to this court can be

considered. This may be shown: 1. By express averment, in or necessary intendment from the pleadings. 2. By a ruling stated in a bill of exceptions. 3. In Louisiana, by a statement of facts, and the decision thereon. 4. By an entry on the record of proceedings of the appellate court, in a case in which such a question may have arisen and been decided—that it was in fact raised and decided; and this entry must appear to have been made by order of the court, and must be certified by the clerk as part of the record. A certificate to that effect, made by the presiding judge, and certified by the clerk as part of the record, will be presumed to have been made by authority of the court. 5. In equity, it may be stated in the final decree. 6. It may appear that the state court could not have given the judgment or decree passed without deciding such question. *Armstrong v. Treasurer of Athens County*, 16 P. 281....xiv. 299.

2. Under the 25th section of the judiciary act, it must appear, 1. That some one of the questions stated in that section did arise in the state court. 2. That the question was decided by the state court, as required in the same section. 3. It is sufficient if it appear by clear and necessary intendment from the record that the question must have been raised and decided; it need not appear in terms. 4. It is not sufficient that a question might have arisen or been applicable; it must appear it did arise, and was applied. *Crowell v. Randell*, 10 P. 368....xii. 164.

3. It must appear by the record that one of the specific questions described in the 25th section of the judiciary act necessarily arose, and was determined adversely to the right, &c., claimed under the constitution, or some law or treaty of the United States; otherwise, this court has not jurisdiction. The written opinion of a state court, filed among the papers, is not a part of the record, and cannot be examined under that section, to ascertain the questions decided. An order made by a court of a State, after the removal of the record by a writ of error, not by way of amendment, but introducing new matter, cannot be deemed a part of the record. *Williams v. Norris*, 12 W. 117....vii. 72.

4. No writ of error lies to the highest court of law or equity of a state court, unless there is something apparent on the record, bringing the case within the appellate jurisdiction of this court. *Ingles v. Coolidge*, 2 W. 363....iv. 135.

5. The report of the judge who tries the cause at *nisi prius*, containing a statement of the facts, is not to be considered as a part of the record; the judgment being rendered upon a general verdict, and the report being mere matter *in pais* to regulate the discretion of the court as to the propriety of granting a new trial, the writ of error, in such a case, will be dismissed. *Id.*

6. If it appear from the record that an act of congress must have been construed by the highest court of a State, and the decision was against the plaintiff in error, this court has jurisdiction under the 25th section of the judiciary act. *Harris v. Dennie*, 3 P. 292....viii. 422.

7. If it sufficiently appear from the record, that the repugnancy of a statute of a State to the constitution of the United States was drawn into question, this court has jurisdiction, though the record does not in terms declare that this question was raised. *Satterlee v. Matthewson*, 2 P. 380....viii. 147.

8. Where the record shows that the validity of a state law was questioned by reason of its alleged conflict with the constitution of the United States, and that the decision of the highest court of the State was in favor of the validity of the law, this court has jurisdiction under the 25th section of the judiciary act. *Willson v. Blackbird Creek Marsh Company*, 2 P. 245....viii. 105.

9. Where a cause is brought to this court, by writ of error, or appeal, from the highest court of law or equity of a State, it is not required that the record should, in terms, state a misconstruction of the act of congress, or that it was drawn into question. It is sufficient to give this court jurisdiction of the cause, that the record should show that an act of congress was applicable to the case. *Miller v. Nicholls*, 4 W. 311....iv. 412.

10. It is not sufficient that the state court may have decided that a state law was valid; it must appear that they did so decide. *M'Kinney v. Carroll*, 12 P. 66....xii. 630.

11. Though a treaty or act of congress need not be specially pleaded, the record must show a complete title under the treaty or act relied on, and that the court below decided against its validity. *Hickie v. Starke*, 1 P. 94....vii. 476.

12. It is not necessary that the record should state, in terms, that the validity of a state law was questioned on the ground of its repugnancy to the constitution of the United States; it is sufficient, if the record shows it must have been so, and that the decision was in favor of the validity of the state law. *Craig v. Missouri*, 4 P. 410....ix. 116.

13. If, by consent, the court tried the case without a jury, the facts found by the court and placed on the record are to be considered as showing what questions were made. *Ib.*

14. It not appearing by any averment on the record, in an equity case, that a question under the constitution of the United States was raised in the state court, and as that court might have decided the case without passing on such a question, this court has not jurisdiction. *Mills v. Brown*, 16 P. 525....xiv. 408.

15. This court has not jurisdiction to inquire whether the 7th article of the compact between Virginia and Kentucky, has been impaired by a law of Kentucky, when it does not appear on the record that the plaintiff claims under a law of Virginia. *Fisher's Lessee v. Cockerell*, 5 P. 248....ix. 318.

16. In Louisiana, the opinion of the court is entered of record, and shows on what principles the case was decided, and if it does not appear from the opinion, or otherwise on the record, that some question described in the 25th section of the judiciary act of 1789, was decided against the plaintiff in error, this court has not jurisdiction of a writ of error to the state court. *Grand Gulf Railroad and Banking Company v. Marshall*, 12 H. 165....xix. 83.

17. When there is nothing on the record to bring the case under that section, except a certificate by the state court that "there is drawn in question the validity of statutes of the State of Ohio," &c., without specifying what statutes, or enabling this court to judge whether a case for its jurisdiction exists, the writ of error must be dismissed. *Lawler v. Walker*, 14 H. 149....xx. 104.

18. If there be nothing on the record to show that the defendant was a citi-

sen of Georgia, he cannot raise the question here; whether the state court of Florida rightly took jurisdiction of a case pending in a territorial court at the time of the admission of that State into the Union; he should have pleaded the fact in that court, and thus raised the question, in the only manner open to him, no special provision for such a case having been made by congress. *Carter v. Bennett*, 15 H. 354....xx. 558.

19. This court cannot examine a motion for a new trial certified by the clerk of the state court, to ascertain what questions were there made. They should be in some manner authenticated as made, by the court itself. *Reed's Lessee v. Marsh*, 13 P. 153....xiii. 102.

20. The plaintiff in error sued out of the court of errors of New York, a writ of error to the supreme court of that State, and assigned as an error in fact, that he was consul-general in the United States for the king of Saxony; the defendants in error answered that this did not appear by the record of the supreme court; the court of errors affirmed the judgment of the supreme court; on a writ of error from this court—*Held*, First, That this court can notice nothing which took place in the state court unless it appears on the record. Second, That it is sufficient if it appears an act of congress was applicable to the case, and was misconstrued against the plaintiff's claim. Third, That this did appear, and this court had jurisdiction. *Davis v. Packard*, 6 P. 41 ....x. 17.

21. If the record does not show that the state court in fact decided the case upon a question of local law, this court will not infer that it was decided on such a point, if such decision would be erroneous. *Neilson v. Lagow*, 12 H. 98....xix. 46.

22. Where it does not appear upon the record that any right or title or exemption was set up under the constitution or any law of the United States, this court has not jurisdiction. *Smith v. Hunter*, 7 H. 738....xvii. 382.

## 5. HOW THIS JURISDICTION EXERCISED, AND WHETHER CONSTITUTIONAL.

### CONSTITUTIONAL LAW, D. 2.

1. If it clearly appear that the decision of the state court would have been the same, independent of a law of the State which the plaintiff in error insisted impaired the obligation of a contract, this court will not reverse the decision on that ground, and send the case back to be again decided the same way upon the other ground. *Williams v. Oliver*, 12 H. 111....xix. 55. 12 H. 125....xix. 61.

2. If a judgment, brought here under the 25th section may be supported on any one ground, within the exclusive cognizance of the state court, it would be useless to reverse it, because some point, which this court can reëxamine, was erroneously ruled. *Erwin v. Lowry*, 7 H. 172....xvii. 76.

3. When a case is brought here under that section upon the ground that a law of a State impairs the obligation of a contract, this court must determine whether a contract exists, and what are its constructions and obligations. *State Bank of Ohio v. Knoop*, 16 H. 369....xxi. 190.

4. If it be the established practice of the courts of a State, in an action of ejectment, to look behind the patent and examine into the validity of the pro-



gressive stages of the title, this court, on a writ of error under that section, cannot examine the correctness of that practice. *Ross v. Barland*, 1 P. 655 . . . .vii. 752.

#### d. APPELLATE FROM CIRCUIT COURTS.

##### 1. AMOUNT IN DISPUTE.

ERROR, E; *Infra*, A. t.

1. The plaintiff in error must show that the amount in controversy is sufficient to support the jurisdiction. *Hagan v. Foison*, 10 P. 160 . . . .xii. 54.
2. This court will give time to procure affidavits as to the value of the matter in dispute. *Rush v. Parker*, 5 C. 287 . . . .ii. 265.
3. Though an appraisement, made by order of court, is not conclusive evidence of the amount in dispute in an admiralty case, yet it is generally the best evidence. *United States v. Brig Union*, 4 C. 216 . . . .ii. 80.
4. In deciding whether the matter in dispute be sufficient to sustain the jurisdiction of this court, it will look to the sum alleged by the obligee to be due upon the condition of the bond, and not to the penalty. *United States v. M'Dowell*, 4 C. 316 . . . .ii. 120.
5. If the judgment of the circuit court be for less than \$2,000, this court has not jurisdiction of a writ of error by the defendant, though the amount claimed by the plaintiff in his declaration exceeded \$2,000. *Gordon v. Ogden*, 3 P. 33 . . . .viii. 272. *Smith T. v. Honey*, 3 P. 469 . . . .viii. 491.
6. If there is judgment against the defendant for \$200,000, the penalty of the bond declared on, to be discharged on payment of \$1,800, the amount found by the jury to be the damages for the breach of the condition of the bond, the matter in dispute exceeds \$2,000, within the meaning of the judiciary act, and a writ of error lies to this court. *Wilson v. Daniel*, 3 D. 401 . . . .i. 284.
7. Such a judgment is final, and a writ of error may be brought, though the record does not show that one of the pleas was in any way disposed of *Id.*
8. If the value of the matter in dispute does not appear on the record, either by the demand of the plaintiff, or the finding of the jury, it may be shown by affidavits taken on notice. But in such a case the writ of error does not operate as a *supersedeas*. *Williamson v. Kincaid*, 4. D. 20 . . . .i. 316.
9. If the value of the matter in dispute does not appear, it may be shown by affidavit. *Course v. Stead*, 4 D. 22 . . . .i. 319.
10. Where separate libels were filed by shippers of goods, and consolidated by order of court; and also where several shippers joined originally in one libel; the object of each being to recover a several compensation for injury done to his goods, from some cause for which the carrier was responsible. *Held*, That to test the right to appeal, each cause of damage must be considered separately, and if the damage awarded to a particular shipper, did not exceed \$2,000, there could be no appeal as to his cause. *Rich v. Lambert*, 12 H. 347 . . . .xix. 171.



11. In a salvage case, the appellant must show that his individual interest involved in the decree amounted to \$2,000. *Spear v. Place*, 11 H. 522.... xviii. 699; *Stratton v. Jarvis*, 8 P. 4.... xi. 3.

12. No appeal lies from a decree of a circuit court on an information for the forfeiture of a vessel, which has been sold, by order of the court, for the sum of \$850, though the parties agreed on the record its true value exceeded \$2,000; for the money in the registry is the only matter in controversy. *Gruner v. United States*, 11 H. 163.... xviii. 585.

13. A decree that the respondent, as administrator, is accountable to the representatives of the deceased for upwards of \$2,000, may be appealed from by him, though the same decree apportions the amount among the complainants, and the distributive share of each is less than \$2,000. *Shields v. Thomas*, 17 H. 3.... xxi. 335.

14. An appellant cannot sustain his appeal upon the ground that, if interest were added to the balance of account claimed in the libel, more than \$2,000 was in dispute, at the time of the decree in the circuit court, unless his libel claims interest. *Udall v. Steamship Ohio*, 17 H. 17.... xxi. 344.

15. The amount necessary to the jurisdiction of this court, is the sum in controversy at the time of the judgment, and interest afterwards cannot be considered. *Knapp v. Banks*, 2 H. 73.... xv. 37.

16. If the plaintiff claims on the record more than \$2,000, and recovers less than that sum, he may have a writ of error. *Ib.*

17. If the sum or value in dispute, at the time of the decree in the circuit court, exceeded \$2,000, an appeal may be taken, though a part of the sum consists of interest which had accrued since the suit was instituted. *Bank of the United States v. Daniel*, 12 P. 32.... xii. 618.

18. Upon a bill in equity to obtain a decree for a sale of a lot of land to satisfy an alleged lien by a deed of trust, the matter in controversy is the amount of the debt, not the value of the land; so that the plaintiff cannot appeal if his debt claimed is below the requisite sum. *Farmers' Bank of Alexandria v. Hooff*, 7 P. 168.... x. 441.

19. Where the property condemned as forfeited, for an entry under a false denomination, was of greater value than \$2,000, but, if the duties were paid and deducted from the proceeds, less than \$2,000 would remain — *Held*, that the whole value of the property was the amount in dispute, and the claimant had a right to appeal. *United States v. Eighty-four Boxes of Sugar*, 7 P. 453.... x. 541.

20. Where a recovery of a tract of land was had, in an action of ejectment, and a writ of restitution was awarded of a small portion thereof, of less value than \$2,000, this court has not jurisdiction of a writ of error which brings up only the proceedings touching such restitution. *Grant v. M'Kee*, 1 P. 248.... vii. 557.

21. In replevin, if it be of goods distrained for rent, the amount for which avowry is made, is the value of the matter in controversy; and if the writ be issued to try the title to property, it is in the nature of detinue, and the value of the article replevied is the value of the matter in dispute, under the acts concerning jurisdiction. *Peyton v. Robertson*, 9 W. 527.... vi. 167.

22. Where the question is whether property of greater value than \$2,000 is

liable to be taken in execution for a less sum than \$2,000, the latter is the amount in dispute, and there can be no appeal. *Ross v. Prentiss*, 3 H. 771 . . . . xv. 639.

23. A claim in a libel of "\$1,800 and upwards," will not support an appeal. *Olney v. Steamship Falcon*, 17 H. 19 . . . . xxi. 346.

24. Though seamen join in a libel in the admiralty, the matter in dispute is several with each libellant, and the claimant can appeal only in regard to a separate demand by a seaman exceeding the sum of \$2,000. *Oliver v. Alexander*, 6 P. 143 . . . . x. 69.

ERROR, E. 7.

## 2. FINALITY OF JUDGMENT OR DECREE.

APPEAL, A.; ERROR, B.

The 22d section of the judiciary act, authorizes a writ of error only after a final judgment or decree. *Rutherford v. Fisher*, 4 D. 22 . . . . i. 318.

## 3. FORMAL PROCEEDINGS.

APPEAL, B. D.; ERROR, A. C. D.

## 4. CERTIFICATES OF DIVISION OF OPINION UNDER THE ACT OF APRIL 29, 1802, § 6, (2 STATS. AT LARGE, 159.)

COURTS OF THE UNITED STATES, B. a. 2.

1. The whole of a case cannot be broken up into points and sent to this court on a certificate of division of opinion. *Luther v. Borden*, 7 H. 1 . . . . xvii. 1.

2. Though the motion on which a question arises, where the judges divide in opinion, was an appeal to their discretion, yet, if the question on which they divide is matter of strict right, this court has jurisdiction, and will decide all the points necessary to a decision of that question, if they arose simultaneously and the judges differed thereon. *United States v. Chicago*, 7 H. 185 . . . . xvii. 82.

3. The whole case appearing to have been broken up into points and certified to this court under a *pro formâ* division of opinion, jurisdiction does not exist. *Webster v. Cooper*, 10 H. 54 . . . . xviii. 295.

4. On a certificate of division of opinion, this court cannot inquire whether the parties were properly before the circuit court. *Wayman v. Southard*, 10 W. 1 . . . . vi. 311.

5. Where the opinions of the judges of the circuit court are opposed, this court can only consider the single question upon which the judges below divided in opinion, but the parties will not be precluded from bringing a writ of error upon the final judgment below, and the whole cause will then be before the court. *Ogle v. Lee*, 2 C. 33 . . . . i. 439.

6. Where, on opening the record, it appeared to contain a certificate that the judges of the circuit court for Rhode Island district had differed in opinion,

but the point on which they differed was not stated, the case was remanded with directions to proceed according to law. *Wolf v. Usher*, 3 P. 269.... viii. 415.

7. A difference of opinion upon a motion to revive a suit which had been abated, being an application to the discretion of the court, cannot be certified here. *Davis v. Braden*, 10 P. 286....xii. 123.

8. And this court cannot take jurisdiction, and decide whether a motion to set aside a judgment on a bail bond ought to prevail, though the various questions upon which the motion depended are separately certified, for they bring the whole case before this court, and not some single material point, occurring in the progress of a trial. *White v. Turk*, 12 P. 238....xii. 711.

9. A division of the judges of the circuit court, on a motion for a new trial, in a civil or a criminal case, is not such a division of opinion as is to be certified to this court for its decision. *United States v. Daniel*, 6 W. 542....v. 157.

10. Though this court does not regulate the discretion of the court below as to granting a new trial, yet where a case came up on a certificate of division of opinion whether a new trial should be granted, and the division was upon the same points raised by bills of exception taken at the trial and contained in the record, the court allowed the argument to proceed, reserving its judgment until a writ of error was sued out. *Grant v. Raymond*, 6 P. 218.... x. 94.

11. The counsel for the prisoner moved the court to instruct the jury, that the evidence did not conduce to establish his guilt; the judges differed as to the propriety of this instruction and certified their difference. *Held*, that this transferred the whole case, and was not within the act, and this court had not jurisdiction. *United States v. Bailey*, 9 P. 267....xi. 354.

12. A question depending on the discretion of the circuit court cannot be certified to this court. *Smith v. Vaughan*, 10 P. 866....xii. 163; *Packer v. Nixon*, 10 P. 408....xii. 178.

13. This court has not jurisdiction upon a certificate of division respecting the marshal's poundage on an execution. *Bank of the United States v. Green*, 6 P. 26....x. 11.

14. Where the whole case has been sent to this court, upon a certificate of division of opinion, it will be remanded to the circuit court. *Saunders v. Gould*, 4 P. 392....ix. 110.

15. This court has not jurisdiction upon a certificate of division of opinion, *pro formâ*, in a circuit court, entered in a case irregularly transferred there from the district court. *United States v. Stone*, 14 P. 524....xiii. 642.

16. This court cannot take jurisdiction upon a certificate of a question on which the opinions of the judges of the circuit court are opposed, upon some proceeding subsequent to the decision of the cause in that court. *Devereaux v. Marr*, 12 W. 212....vii. 181.

17. A question, whether upon all the facts the obligation of the creditor to give notice to the guarantor has been complied with, is not proper to be certified for the opinion of this court. *Adams v. Jones*, 12 P. 207....xii. 696.

18. On a certificate of division of opinion, if, upon inspecting the record, it

appears that the particular point or points upon which the justices of the circuit court differed in opinion are not distinctly stated, the case will be dismissed for want of jurisdiction. *Sadler v. Hoover*, 7 H. 646....xvii. 333.

19. The 6th section of the act of 1802, gives jurisdiction to this court only where the judges of the circuit court differ in opinion on a question of law. *Wilson v. Barnum*, 8 H. 258....xvii. 579.

20. A question whether a machine is substantially like a thing patented cannot be certified here. *Ib.*

21. This court is not authorized by that section to take jurisdiction upon a certificate that the judges of a circuit court were divided in opinion upon the question whether a demurrer was well taken. The particular point on which there was a division must be stated. *United States v. Briggs*, 5 H. 208....xvi. 360.

22. The whole case cannot be broken up into points, some of which may never arise, and sent to this court upon a certificate of division of opinion. *Nesmith v. Sheldon*, 6 H. 41....xvi. 595.

#### 5. HABEAS CORPUS AND MANDAMUS.

(See THOSE TITLES.)

A writ of error does not lie, to reëxamine the judgment of a circuit court, on a writ of *habeas corpus ad subjiciendum*. *Barry v. Mercein*, 5 H. 103....xvi. 327.

#### 6. GENERALLY.

1. An action at law, carried by writ of error from the district to the circuit court cannot be brought here by appeal; nor does a writ of error from this court lie in such a case. See act of July 4, 1840, § 3, (5 Stats. at Large, 393.) *Sarchet v. United States*, 12 P. 143....xii. 665.

2. No writ of error lies to the supreme court of the United States, to reverse the judgment of a circuit court in a civil action, which has been carried up to the circuit court from the district court by writ of error. *United States v. Goodwin*, 7 C. 108....ii. 472. *United States v. Gordon*, 7 C. 287....ii. 532. *United States v. Barker*, 2 W. 895....iv. 149.

3. Though a record, brought by a writ of error from the circuit court for Louisiana, does not show any question of law upon which this court can pass, the case cannot be dismissed for want of jurisdiction for that cause. *Minor v. Tillotson*, 1 H. 287....xiv. 613.

4. The plaintiff has a right to be heard on the question whether error appears on the record. *Ib.*

5. A decree in an equity cause, brought by appeal from the district court of the United States for the eastern district of Louisiana, was reversed, and the cause remanded, for the reason that the parol evidence did not appear on the record, in the form of depositions. *New Orleans v. United States*, 5 P. 449....ix. 418.

6. A writ of error to a circuit court, to remove a record in a case carried thither from the district court for the northern district of Alabama, under the

act of February 6, 1839, § 9, can issue only in those cases in which it may issue when cases are carried to the circuit from the district courts, under the judiciary act of 1789, and by the act of July 4, 1840, which gave a writ of error from this court in such cases. *Mayberry v. Thompson*, 5 H. 121 . . . .xvi. 330.

7. By the act of May 26, 1824, (4 Stats. at Large, 62,) to regulate the mode of practice of the courts of the United States in the district of Louisiana, congress has not altered the appellate jurisdiction of this court, nor attempted to give it the power to reëxamine the facts once tried by a jury in an action at law. *Parsons v. Bedford*, 3 P. 433 . . . .viii. 474.

#### e. APPELLATE FROM DISTRICT COURTS.

MANDAMUS ; PROHIBITION ; PUBLIC LANDS OF THE UNITED STATES, III. D. d. 2, 3.

1. An appeal does not lie to this court from a decree of a district court in bankruptcy. *Crawford v. Points*, 13 H. 11 . . . .xix. 356.

2. The record of the district court for the northern district of California, in a proceeding to confirm a Mexican title, did not show that the land lay in that district. The case was remanded. *Cervantes v. United States*, 16 H. 619 . . . .xxi. 321.

3. This court has jurisdiction by writ of error of the proceedings upon a *caveat*, filed in or removed to the district court of the United States for Kentucky. *Wilson v. Mason ; Mason v. Wilson*, 1 C. 45 . . . .i. 346.

#### f. APPELLATE FROM COURTS OF TERRITORIES AND THE DISTRICT OF COLUMBIA.

1. Under the act of March 26, 1804, § 8, (2 Stats. at Large, 285,) this court had appellate jurisdiction, by writ of error to the district court of the territory of Orleans. *Durousseau v. United States*, 6 C. 307 . . . .ii. 412. *Morgan v. Callender*, 4 C. 370 . . . .ii. 139.

2. No act of congress has authorized a writ of error from this court to the general court of the northwestern territory, consequently such a writ was dismissed. *Clarke v. Bazadone*, 1 C. 212 . . . .i. 396.

3. A writ of error to the supreme court of the territory of Wisconsin was pending in this court, when the State of Wisconsin was admitted into the Union, and no provision was made by any act of congress for the execution of the mandate of this court in such a case, by any inferior court ; *Held*, 1. That as the territorial court had ceased to exist, and no court had been empowered to execute the mandate of this court, the writ must be dismissed ; 2. That as the subject of the suit was a matter not within the judicial power of the United States within a State, congress could not empower any court therein to execute the mandate of this court after the admission of Wisconsin into the Union. *McNulty v. Batty*, 10 H. 72. . .xviii. 300.

4. The next preceding decision, *McNulty v. Batty*, 10 H. 72, affirmed and applied to this case. *Preston v. Bracken*, 10 H. 81 . . . .xviii. 304.

5. A writ of error lies from an order of the circuit court for the District

of Columbia, quashing an inquisition in the nature of a writ of *ad quod damnum*. *Custiss v. Georgetown and Alexandria Turnpike Co.* 6 C 233.... ii. 383.

6. This court has jurisdiction of a writ of error to the circuit court of the United States for the District of Columbia, sued out by the plaintiffs in a petition for freedom, though the value of their freedom to them is not susceptible of a pecuniary estimate. *Lee v. Lee*, 8 P. 44....xi. 20.

7. The act of February 27, 1801, § 8, gives a writ of error to the circuit court for the District of Columbia, though in the particular case all right of appeal had been taken away by the legislation of the State of Virginia. *Young v. Bank of Alexandria*, 4 C. 384....ii. 149.

8. Upon a writ of error to the circuit court for the District of Columbia, this court has no jurisdiction, if the sum awarded be less than \$100, although a greater sum may have been originally claimed. *Wise v. Columbian Turnpike Co.* 7 C. 276....ii. 526.

9. This court has no jurisdiction of causes brought before it, upon a certificate of a division of opinions of the judges of the circuit court for the District of Columbia. The appellate jurisdiction of this court, in respect to that court, only extends to the final judgments and decrees of the latter. *Ross v. Triplett*, 3 W. 600....iv. 309.

10. An appeal lies to this court from the sentence of the circuit court of the District of Columbia, affirming the sentence of the orphans' court of Alexandria county, which dismissed a petition to revoke the probate of a will. *Carter's Heirs v. Cutting*, 8 C. 251....iii. 114.

11. The decision of the orphans' court for the county of Washington, in the District of Columbia, as to the *quantum* of commissions to be allowed to an executor, is conclusive, and no appeal lies. *Nicholls v. Hodges*, 1 P. 562....vii. 698.

12. The supreme court has not jurisdiction of a writ of error to the circuit court for the District of Columbia in a criminal case. *United States v. More*, 8 C. 159....i. 550.

13. The office of guardian is not of the value of a thousand dollars, and no appeal lies from the circuit court for the District of Columbia to this court in a case in which the matter in controversy is, who of two persons shall be guardian. *Ritchie v. Mauro*, 2 P. 243....viii. 104.

## B. CIRCUIT COURTS. (PRACTICE, II. A. 2.)

### a. FROM THE CHARACTERS OF THE PARTIES.

#### *Infra*, F.

### 1. GENERALLY, AND HEREIN OF THE NECESSARY AVERMENTS ON THE RECORD. (EQUITY, B. b. 1.)

1. Under the 11th and 20th sections of the judiciary act, the circuit courts of the United States have jurisdiction of writs of right; if the value of the land demanded does not exceed \$500 it affects the costs. *Green v. Lister*, 8 C. 229....iii. 104.

2. A citizen of Louisiana may be sued in the circuit court in the western district of Louisiana, if found there, though he resides in the eastern district. *M Micken v. Webb*, 11 P. 25 . . . . xii. 325.

3. In order to maintain a suit in the circuit court, the jurisdiction must appear on the record ; as, if the suit is between citizens of different States, the citizenship of the respective parties must be set forth. *Sullivan v. Fulton Steamboat Company*, 6 W. 450 . . . . v. 121.

4. It is not necessary to aver on the record, that the defendant in the circuit court was an inhabitant of the district, or was found therein at the time of serving the writ. *Gracie v. Palmer*, 8 W. 699 . . . . v. 547.

5. The declaration contained no averment of the citizenship of the defendant ; but in joining in demurrer the plaintiff averred the defendant to be a citizen of New York ; under the peculiar circumstances of this case held sufficient. *Bradstreet v. Thomas*, 12 P. 59 . . . . xii. 627.

6. It must appear upon the record that the character of the parties supports the jurisdiction. *Montalet v. Murray*, 4 C. 46 . . . . ii. 14. *Morgan v. Callender*, 4 C. 870 . . . . ii. 139.

6 *a*. And where the record did not show that the court below had jurisdiction, the decree of that court for the complainants was reversed. *Wallen v. Williams*, 7 C. 602 . . . . ii. 683.

7. An averment that the plaintiff is an alien, and the defendants "The Pennsylvania Railroad Company," without saying whether a corporation or not, will not support the jurisdiction. *Piquignot v. Pennsylvania Railroad Company*, 16 H. 104 . . . . xxi. 44.

8. If the record contain proper averments of citizenship to give the circuit court jurisdiction, they can be traversed only by a plea to the jurisdiction. *Wickliffe v. Owings*, 17 H. 47 . . . . xxi. 357.

9. An allegation that the lessor of the plaintiff is a citizen of the State of Missouri is sufficient, without an averment that Missouri is one of the United States. *Wright v. Hollingsworth's Lessee*, 1 P. 165 . . . . vii. 515.

10. An averment that the defendant is a naturalized citizen of the United States, and resides in Louisiana, and the plaintiff is a citizen of France, is sufficient to give jurisdiction to a circuit court. *Gassies v. Ballon*, 6 P. 761 . . . . x. 366.

11. An averment that the plaintiff is a citizen of Maryland, and the defendant a citizen or resident of Louisiana, is not sufficient to show that the court has jurisdiction, and the defect is not cured by the plea that both the plaintiff and defendant are citizens of Louisiana. *Brown v. Keene*, 8 P. 112 . . . . xi. 41.

12. In Alabama, if an action be brought on a joint promissory note against two makers, and one is not found, the plaintiff may discontinue against the latter and proceed against the one served ; if he does so, an averment in the writ only, of the citizenship of the one not proceeded against, is sufficient. *Smith v. Clapp*, 15 P. 125 . . . . xiv. 47.

13. The citizenship of the parties was averred in the title of the bill, but not in the bill itself. *Held*, that the court had not jurisdiction. *Jackson v. Ashton*, 8 P. 148 . . . . xi. 53.



## 2. ALIENS.

1. Although the plaintiff be described in the proceedings as an alien, yet the defendant must be expressly stated to be a citizen of some one of the United States. Otherwise, the courts of the United States have not jurisdiction in the case. *Hodgson v. Bowerbank*, 5 C. 303....ii. 273.

2. The courts of the United States have not jurisdiction between aliens. *Montalet v. Murray*, 4 C. 46....ii. 14. *Morgan v. Callender*, 4 C. 370....ii. 139.

3. The courts of the United States have jurisdiction in a case between citizens of the same State, if the plaintiffs are only nominal plaintiffs for the use of an alien. *Browne v. Strode*, 5 C. 303....ii. 273.

4. The parties to an equity suit must be so described on the record as to show that the court has jurisdiction. It is not enough that an alien is a party; the other party must be a citizen. *Mossman v. Higginson*, 4 D. 12....i. 313.

5. The circuit court has not jurisdiction where the record alleges the plaintiff to be an alien, and is silent as to the citizenship of the defendants. *Jackson v. Twentyman*, 2 P. 136....viii. 51.

6. If an alien and a citizen join in a suit against defendants, whom the citizen plaintiff is not competent to sue, and thereupon the citizen plaintiff's name is stricken out, the court has jurisdiction, and may proceed to a decree. *Conolly v. Taylor*, 2 P. 556....viii. 210.

## ALIEN, C. 14.

## 3. CITIZENS OF DIFFERENT STATES, AND HEREIN OF CORPORATIONS.

## (EQUITY, B. b. 1.)

1. The fact that the plaintiff is a citizen of a Territory, and the defendant of a State, does not enable the courts of the United States to take jurisdiction. *Corporation of New Orleans v. Winter*, 1 W. 91....iii. 476.

2. Nor do the further facts, that some of the joint plaintiffs, who might have sued severally, are citizens of one State and the defendant of another State. *Ib.*

3. If a judgment at law be recovered in a circuit court, the defendant in the judgment may file a bill in that court to enjoin the judgment against the representative of the plaintiff in the judgment, though that representative be a citizen of the same State as the defendant in the judgment; it is but a continuation, in substance, of the original suit. *Dunn v. Clarke*, 8 P. 1....xi. 1.

4. If other parties are made by the bill, and different interests involved, it is, as to them, an original suit, and the jurisdiction of the court must depend upon their liability to be sued by the plaintiff, as in other cases. *Ib.*

5. When the jurisdiction of the court below depends on the citizenship of the parties, if the record does not show the necessary citizenship, the judgment will be reversed for want of jurisdiction. *Bingham v. Cabot*, 3 D. 382....i. 267. *Emory v. Greenough*, 3 D. 369....i. 265. *Turner v. Enrille*, 4 D. 7....i. 311. *Abercrombie v. Dupuis*, 1 C. 343....i. 422. *Wood v. Wagon*, 2 C. 9....i. 427.

6. If a new party and subject-matter are brought before the court by a supplemental bill, it must show that the court has jurisdiction by reason of the citizenship of the parties to that bill. *Course v. Stead*, 4 D. 22....i. 319.

7. Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued in the courts of the United States, to sustain the jurisdiction. *Strawbridge v. Curtiss*, 3 C. 267 . . . i. 575.

8. Where the interest is not joint, the court gives no opinion. *Ib.*

9. The circuit court has not jurisdiction of a case in which a corporation is defendant, if the record contains no averment concerning the citizenship of the corporators. *Breithaupt v. Bank of the State of Georgia*, 1 P. 238 . . . vii. 551.

10. Whether a corporation aggregate can be sued in the courts of the United States depends upon the citizenship of its members. *Hope Insurance Company v. Boardman*, 5 C. 57 . . . ii. 200. *Bank of the United States v. Deveaux*, 5 C. 61 . . . ii. 194.

11. A plea that two of the corporators are citizens of the same State as the plaintiff, defeats the jurisdiction. *Commercial and Railroad Bank of Vicksburg v. Slocumb*, 14 P. 60 . . . xiii. 346.

12. The act of February 28, 1839, § 1, (5 Stats. at Large, 321,) has wrought no change in the jurisdiction of the circuit courts, as respects the character of parties; it only obviates difficulties arising from inability to join, or serve those, not liable to be sued by the plaintiff, or not within reach of process. *Ib.*

13. A railroad corporation, chartered by the State of South Carolina, to build and manage a railroad in that State, may be sued by a citizen of New York, in the circuit court of the United States for the district of South Carolina, although some of the owners of shares of the capital stock are not citizens of South Carolina, and the State of South Carolina owned some of the shares. *Louisville, Cincinnati, and Charleston Railroad Company v. Letson*, 2 H. 497 . . . xv. 193.

14. The jurisdiction of the circuit courts of the United States where a corporation is a party, reëxamined and held to attach, where the averment on the record shows that a citizen of one State sues a corporation, created by the legislature of another State. *Marshall v. Baltimore and Ohio Railroad Company*, 16 H. 314 . . . xxi. 153.

15. A plea to the jurisdiction of the circuit court must show that the parties were citizens of the same State, at the time the action was brought, and not merely at the time of the plea pleaded. The jurisdiction depends upon the state of things at the time of the action brought; and after it is once vested, it cannot be ousted by a subsequent change of residence of either of the parties. *Mollan v. Torrance*, 9 W. 537 . . . vi. 172.

16. If a real conveyance of land has been made to a citizen of another State, who brings his action therefor, it is of no importance that the grantor was induced to convey because he thought his title would be held good in a court of the United States, and bad in a court of the State, nor that the conveyance, though in form absolute, was really but a mortgage. *McDonald v. Smalley*, 1 P. 620 . . . vii. 732.

17. If a mortgage be actually sold and assigned so as to make the complainant the real owner thereof, he may sue in a circuit court of the United States, though one inducement to sell and to assign was to vest the title in one able to bring a suit in that court. *Smith v. Kernochen*, 7 H. 198 . . . xvii. 90.

18. *Aliter*, if the assignor continues the real owner. *Ib.*

19. But this must be pleaded to the jurisdiction; it is waived by a plea in bar. *Ib.*

20. The jurisdiction of the circuit court, having once vested, cannot be divested by a change of domicile of one of the parties, *pendente lite*. *Morgan's Heirs v. Morgan*, 2 W. 290....iv. 110.

21. Where M'R., a citizen of Kentucky, brought a suit in equity, in the circuit court of Kentucky, against C. C., stated to be a citizen of Virginia, and E. J., and S. E., without any designation of a citizenship; all the defendants appeared and answered; and a decree was pronounced for the plaintiff; it was held, that if a joint interest vested in C. C., and the other defendants, the court had no jurisdiction over the cause. But that if a distinct interest vested in C. C., so that substantial justice, (so far as he was concerned,) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone. *Cameron v. M'Roberts*, 3 W. 591....iv. 303.

#### CITIZEN, 7.

#### 4. ASSIGNEES, INDORSEES, EXECUTORS, AND ADMINISTRATORS, AND NOMINAL PLAINTIFFS.

1. The 11th section of the judiciary act, touching the right of assignees of *choses in action*, does not apply to executors or administrators. They may sue citizens of other States, though their testators or intestates were citizens of the same State as the defendants. *Childress v. Emory*, 8 W. 642....v. 530.

2. In a count on a negotiable note by the executor of the surviving partner of the firm to which the note was payable, it is not necessary to state the names of the persons who composed the firm. *Ib.*

3. The statute of Mississippi, requiring payees and indorsees to be joined in a suit by the holder of a promissory note, will not enable an indorsee to sue the maker and indorser in a circuit court of the United States, if the maker and payee were citizens of the same State. *Dromgoole v. Farmers and Merchants' Bank of Mississippi*, 2 H. 241....xv. 108.

4. The 11th section of the judiciary act, makes it necessary to state on the record the citizenship of the payee of a negotiable note sued on by an indorsee. *Turner v. Bank of North America*, 4 D. 8....i. 311.

5. An indorsee of a promissory note, who resides in a different State, may sue, in the circuit court, his immediate indorser, residing in the State in which the suit is brought, although that indorser be a resident of the same State with the maker of the note. *Mollan v. Torrance*, 9 W. 537....vi. 172.

6. But where the suit is brought against a remote indorser, and the plaintiff, in his declaration, traces his title through an intermediate indorser, he must show that this intermediate indorser could have sustained his action in the circuit court. *Ib.*

7. Under the 11th section of the judiciary act, the assignor of a *chose in action*, not negotiable, is to be deemed the party plaintiff, and if he is competent to sue the defendant, the court has jurisdiction. *Irvine v. Lowry*, 14 P 293....xiii. 467.

8. *Aliter*, where the nominal plaintiff acts, by a provision of statute law, as a mere conduit to the real party in interest, as in *Brown v. Strode*, 5 Cranch, 303. *Ib.*

9. The assignee of a bond and mortgage who comes into a court of equity to obtain payment of the debt, brings "a suit to recover the contents of a *chose in action*," within the meaning of the 11th section of the judiciary act of 1789, and must show that his assignor was competent to sue the defendant in the circuit court. *Sheldon v. Sill*, 8 H. 441....xvii. 651.

10. An indorsee, a citizen of one State, may sue an indorser, a citizen of another State. *Evans v. Gee*, 11 P. 80....xii. 344.

11. Under the 11th section of the judiciary act, if the payee and maker of a promissory note were both aliens, the indorsee cannot sue in the courts of the United States. *Montalet v. Murray*, 4 C. 46....ii. 14.

12. A general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued in those courts. *Sere v. Pitot*, 6 C. 332....ii. 423.

13. An assignment of a note payable to bearer, by delivery only, without indorsement, is not within the 11th section of the judiciary act, and it is not necessary to aver the citizenship of the assignor. *Smith v. Clapp*, 15 P. 125....xiv. 47.

14. Under the 11th section of the judiciary act, the indorsee of a negotiable promissory note cannot sue in the circuit court, if the maker and payee were, at the time the action was brought, citizens of the same State. *Gibson v. Chew*, 16 P. 315....xiv. 316.

15. The circuit court has jurisdiction of a suit brought by the indorsee of a promissory note, who is a citizen of one State, against the indorser, who is a citizen of a different State, whether a suit could be brought in that court by the indorser, against the maker, or not. *Young v. Bryan*, 6 W. 146....v. 43.

16. The payee of a note, at its date, was a citizen of the same State as the maker; subsequently, he became a citizen of another State, and then indorsed the note to a citizen of the latter State. *Held*, that the indorsee might sustain an action in the circuit court in his own name, the case not being within the exception in the 11th section of the judiciary act. *Kirkman v. Hamilton*, 6 P. 20....x. 8.

17. To support an action of replevin to recover bank bills, it is not necessary to show that the plaintiffs' assignor could have sued, though the title to the bills was conveyed to the plaintiff after they were taken and while they were detained by the defendant. *Deshler v. Dodge*, 16 H. 622....xxi. 321.

18. The 11th section of the judiciary act of 1789 does not apply to an action to recover the note itself, but to an action to recover its contents. *Ib.*

19. Under the practice of Louisiana, if the petition aver that the note declared on was made payable to the petitioner and a third person, solely for the use of the petitioner, he is not to be treated as an assignee of the note, and need not aver that such third person was competent to sue, in order to bring the case within the exception in the 11th section of the judiciary act. *M'Micken v. Webb*, 11 P. 25....xii. 325.

20. A bill of revivor is but a continuation of the original suit; and if the

plaintiff was competent to sue the defendant in the circuit court, his administrator, though a citizen of the same State as the defendant, may revive it. *Clarke v. Matthewson*, 12 P. 164....xii. 674.

21. Under the 31st section of the judiciary act, an executor or administrator of a deceased party has power to prosecute or defend an action by or against the deceased, without regard to his own citizenship; and this law is constitutional. *Ib.*

22. The circuit court has jurisdiction, under the 11th section of the judiciary act of 1789, of a suit in the name of the governor of a State on a sheriff's bond to the governor, if the parties beneficially interested in that suit be citizens of another State, and competent to sue the defendant. *M'Nutt v. Bland*, 2 H. 9....xv. 1.

23. A citizen of one State having the legal title, may sue a citizen of another State in a circuit court, without reference to the citizenship of the plaintiffs *cestuis que trust*. *Bonnafée v. Williams*, 3 H. 574....xv. 558.

24. A marshal, even after he has gone out of office, is competent to sue, in a court of the United States, on an attachment bond, citizens of the State of which he is himself a citizen, averring on the record that the suit is brought for the benefit of the plaintiffs in the original action, and that they are citizens of another State. *Huff v. Hutchinson*, 14 H. 586....xx. 354.

25. As the Bank of the United States does not derive its capacity to sue from the judiciary act, it is not affected by the prohibition contained in the 11th section of that act concerning suits by assignees, nor is the citizenship of those interested to be regarded. *Bank of the United States v. Planters' Bank of Georgia*, 9 W. 904....vi. 304.

BILLS, &c. A. 2; OMNIA RITE ESSE ACTA.

#### b. FROM THE SUBJECT MATTER.

##### 1. CIVIL CASES ARISING UNDER LAWS OF THE UNITED STATES.

1. In an action of debt, by John Tyler, President of the United States, as successor in office of Martin Van Buren, founded on bonds alleged to have been made by the defendants to M. B. and his successors for the use of the orphan children provided for in a treaty with the Choctaw Indians, upon a demurrer to the declaration, it was held: 1. That it was not cause of special demurrer that the citizenship of the plaintiff was not shown on the record. 2. Nor that the plaintiff sued as successor. 3. Nor that the parties for whose use the action was brought are not named. 4. Nor that there was no act of Congress requiring the bonds to be taken. 5. Nor that the taking of the bonds by the President was without actual consideration. 6. That where a demurrer in abatement of the action is taken, and overruled, the judgment for the plaintiff is final. *Tyler v. Hand*, 7 H. 573....xvii. 300.

2. Under the act of March 3, 1815, (3 Stats. at Large, 245, § 4,) the circuit courts of the United States have jurisdiction of suits by the postmaster-general, upon official bonds of postmasters. *Postmaster-General of the United States v. Early*, 12 W. 136....vii. 86.

3. Though Evans's patent was granted pursuant to the special act for his re-

lief, it was also pursuant to the general patent acts then in force; and therefore, under the act of April 17, 1800, (2 Stats. at Large, 37,) the circuit court of the United States had jurisdiction, though both parties were citizens of the same State. *Evans v. Eaton*, 3 W. 454....iv. 260.

4. The charter of the Bank of the United States does not enable that bank to sue in the courts of the United States. *Bank of the United States v. Deveaux*, 5 C. 61....ii. 194.

#### BANK OF THE UNITED STATES, 2.

### 2. CRIMES UNDER LAWS OF THE UNITED STATES.

AS TO TERRITORIAL EXTENT OF JURISDICTION, see *Infra*, F; LAW OF NATIONS, B.; PIRACY, 10.

### 3. OFFENCES AT COMMON LAW.

1. The courts of the United States have no common-law jurisdiction in cases of libel against the government of the United States. *United States v. Hudson*, 7 C. 32....ii. 445.

2. But they have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders. *Ib.*

3. *Quære*, whether the courts of the United States have jurisdiction of offences at common law against the United States. *United States v. Coolidge*, 1 W. 415....iii. 612.

### 4. LANDS CLAIMED UNDER DIFFERENT STATES.

1. The jurisdiction of the circuit courts of the United States extends to a case between citizens of Kentucky, claiming lands exceeding the value of five hundred dollars, under different grants, the one issued by the State of Kentucky, and the other by the State of Virginia, but upon warrants issued by Virginia, and locations founded thereon, prior to the separation of Kentucky from Virginia. It is the grant which passes the legal title to the land; and if the controversy is founded upon the conflicting grants of different States, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties prior to the grant. *Colson v. Lewis*, 2 W. 377....iv. 140.

### c. WRITS OF ERROR AND APPEALS FROM DISTRICT COURTS.

1. By the 10th section of the judiciary act of 1789, writs of error lie from decisions of the district court for the Maine district, to the circuit court of Massachusetts, in the same manner as from other district courts to their respective circuit courts; notwithstanding that the district court of Maine has all the original jurisdiction of a circuit court. *United States v. Weeks*, 5 C. 1....ii. 172.

2. In all cases where the district court of Maine acts as a district court, the appeal is to the circuit court for the district of Massachusetts. *Sloop Sally v. United States*, 5 C. 372....ii. 299.

3. A circuit court has no authority to issue a *certiorari*, or other compulsory



process, to the district court, for the removal of a cause from that jurisdiction, before a final judgment or decree is pronounced. *Patterson v. United States*, 2 W. 221....iv. 88.

4. In such a case, the district court may, and ought, to refuse obedience to the process of the circuit court, and either party may move the circuit court for a *procedendo*, after the transcript of the record is removed into that court, or may pursue the cause in the district court, as if it had not been removed. *Ib.*

5. But if the party, instead of properly taking advantage of the irregularity in the proceedings, enters his appearance in the circuit court, takes defence, and pleads to issue, it is too late, after verdict, to object to the irregularity, and the supreme court will, on error, consider the cause as an original suit in the circuit court. *Ib.*

#### d. CASES REMOVED FROM STATE COURTS.

##### STATE COURTS, &c. B.

1. Under the 12th section of the judiciary act, the defendant has a right to remove the action from a state to a circuit court, if the sum demanded in the declaration exceed five hundred dollars; and he cannot be deprived of that right by an amendment reducing that sum, allowed by the state court after the right of removal was complete. *Kanouse v. Martin*, 15 H. 198....xx. 467.

2. After the right of removal is complete, any proceedings of the state court in the cause, are erroneous; and without a plea to the jurisdiction, a court of error should examine the proceedings for removal and reverse the judgment. *Ib.*

3. The courts of the United States are not bound by the removal of suits from a state court; they may remand them, if sufficient grounds for their jurisdiction do not appear. *Urtetiqui v. D'Arbel*, 9 P. 692....xi. 532.

#### C. DISTRICT COURTS.

##### 1. EXTENT OF ADMIRALTY JURISDICTION. (*See ADMIRALTY, A.*)

##### 2. CIVIL JURISDICTION.

BANKRUPT LAWS, D.; PENALTIES AND FORFEITURES, C.; PUBLIC LANDS OF THE UNITED STATES, III. D. d. 2, 3; REVENUE LAWS, F.

1. Every district court of the United States possesses all the powers of a court of admiralty, both instance and prize, and may award restitution of property claimed as prize of war by a foreign captor. *Glass v. Sloop Betsey*, 3 D. 6....i. 74.

2. The district court cannot take jurisdiction of a libel for damages, in case of a capture as prize, by a foreign belligerent power on the high seas, the captured vessel not being within the United States, but *infra præsidia* of the captors. *United States v. Peters*, 3 D. 121....i. 127.

3. A writ of prohibition issued. *Ib.*

4. If a captured vessel is abandoned at sea by the captors, and being thus derelict, is taken possession of by a neutral and brought into a neutral port, and libelled for salvage, the district court has jurisdiction to entertain such libel, and



*ex necessitate*, may also adjudicate upon the conflicting claims of the captors and former owners, to the surplus in the registry. *M'Donough v. Dannery*, 3 D. 188....i. 163.

5. In such a case the claim of the captors was allowed, as no neutral nation can impugn or destroy the right vested in the belligerent by the capture. *Ib.*

6. The district court of that district in which a seizure is made on land, has jurisdiction to try the question of forfeiture, under the 9th section of the judiciary act. *Keene v. United States*, 5 C. 304....ii. 274.

7. The courts of the United States have exclusive jurisdiction of all seizures authorized to be made on land or water, for a breach of the laws of the United States; and any intervention of a state authority which, by taking the thing seized out of the hands of the United States officer, might obstruct the exercise of this jurisdiction, is unlawful. *Slocum v. Mayberry*, 2 W. 1....iv. 1.

8. In such a case, the court of the United States, having cognizance of the seizure, may enforce a redelivery of the thing, by attachment or other summary process. *Ib.*

9. The question under such a seizure, whether a forfeiture has been actually incurred, belongs exclusively to the courts of the United States, and it depends upon the final decree of such courts whether the seizure is to be deemed right-ful or tortious. *Ib.*

10. But this applies only to cases in which some law authorizes a seizure of the subject. *Ib.*

11. If the seizing officer refuse to institute proceedings to ascertain the forfeiture, the district court may, upon application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure. *Ib.*

12. If a seizure be made on the high seas, or on waters within the jurisdiction of a foreign state, the district court for the district into which the property is brought, and in which proceedings are instituted, has jurisdiction. *The Merino, The Constitution, The Louisa*, 9 W. 391....vi. 102.

13. The district courts of the United States have jurisdiction of questions of marine trespass by privateers, independent of the special provisions of the prize act of the 26th June, 1812, (2 Stats. at Large, 759.) *The Amiable Nancy*, 3 W. 546....iv. 287.

14. The district court of the United States for the State of Alabama has not jurisdiction of suits instituted by the Bank of the United States, unless the record contain averments which enable the court to look behind its corporate character. *Bank of the United States v. Martin*, 5 P. 479....ix. 434.

### 3. CRIMINAL JURISDICTION.

#### CRIMINAL LAW.

#### D. COURTS OF THE DISTRICT OF COLUMBIA.

##### MANDAMUS, B.

The act of February 27, 1801, (2 Stats. at Large, 103,) enables the circuit court for the District of Columbia, to execute the provision of the charter of the Bank of Columbia, giving the corporation a summary process in the nature of an attachment against its debtors who have by an express consent in writing

made the bonds, bills, or notes by them drawn or indorsed negotiable at the bank. *Bank of Columbia v. Okely*, 4 W. 235 . . . iv. 387.

APPEAL, A. 24.

### E. COURTS OF THE TERRITORIES.

COURTS OF THE UNITED STATES, B. a. 2.

The citizens of the territory of Orleans may sue and be sued in the district court of that territory in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky. *Sere v. Pitot*, 6 C. 332 . . . ii. 423.

### F. WHAT IS JURISDICTION, AND OF ITS TERRITORIAL EXTENT.

CONSTITUTIONAL LAW, D. 2; CRIMINAL PROCEDURE, C. 1; LAW OF NATIONS, B.; PRACTICE, II. A. 2.

1. What is jurisdiction, defined. *Grignon's Lessee v. Astor*, 2 H. 319 . . . xv. 125.

2. A majority of the judges expressed an opinion that the courts of the United States cannot issue attachments against the property of a defendant, except as part of, and together with process *in personam*. *Toland v. Sprague*, 12 P. 300 . . . xii. 729.

3. Where a defendant, who was not within the district when process of foreign attachment issued, afterwards appeared, and pleaded to the merits, the judgment is valid. *Ib.*

4. The district court of the United States in Mississippi, has not jurisdiction to entertain a bill to compel parties to interplead, who are not found within the district, and on whom no personal service was made. *Herndon v. Ridgway*, 17 H. 424 . . . xxi. 588.

5. The courts of the United States have jurisdiction between proper parties, of an action of trespass, *de bonis asportatis*, committed in a foreign country. *Mitchell v. Harmony*, 13 H. 115 . . . xix. 420.

6. If a court exercises over the property of a non-resident, on whom no process is served, any jurisdiction not conferred by law, its act is merely void, not voidable by error or appeal. *Boswell's Lessee v. Otis*, 9 H. 336 . . . xviii. 168.

7 A court of chancery, having jurisdiction over the person who has the legal title to lands in another State, may, by a decree, force him to convey to the holder of the equitable title, for whom he stands as a trustee; but it cannot, by its decree, or through a deed of a commissioner, pass that title. *Watts v. Waddle*, 6 P. 389 . . . x. 164.

8. Though a person having the legal title to land in one State, may be decreed by a court of equity in another State, to convey the land, yet neither the decree, nor any conveyance by virtue of it, by one not having the title, can operate beyond the jurisdiction of the court. *Watkins v. Holman*, 16 P. 25 . . . xiv. 174.

9. Though a court of equity cannot act directly on land not within its jurisdiction, it may compel the holder of the title, who is a party before it, to give effect to a lien. *Lewis v. Darling*, 16 H. 1 . . . xxi. 1.

10. A circuit court sitting in one State cannot order lands to be sold by a commissioner, in another State, to satisfy a lien. *Boyce's Executors v. Grundy*, 9 P. 275 . . . . xi. 356.

11. A license granted to an administratrix in Massachusetts, by the supreme court of that State, to sell lands of the intestate in Alabama, is merely void. *Watkins v. Holman*, 16 P. 25 . . . . xiv. 174.

12. Though a court of chancery, having jurisdiction *in personam*, may exercise its jurisdiction in a case of contract, fraud, or trust, concerning land out of its jurisdiction, it cannot make a decree to restrain, or give compensation for a nuisance, or tort to real property lying in another jurisdiction; and of this character is a bill, by one railroad corporation, to restrain another from doing acts continually injurious to the estate and franchise of the complainants, by crossing their railroad and intruding within their exclusive limits. *Northern Indiana Railroad Company v. Michigan Central Railroad Company*, 15 H. 283 . . . . xx. 490.

13. In Virginia, a decree was made for the specific performance of a parol contract to convey lands in Kentucky, then a part of Virginia, upon the ground of performance by the complainant.—*Held*, that this decree should be enforced by the circuit court in Kentucky, after the organization of that State. *Caldwell v. Carrington's Heirs*, 9 P. 86 . . . . xi. 294.

14. The nature and extent of the title of a receiver, and the operation of foreign bankrupt and insolvent laws examined. *Booth v. Clark*, 17 H. 322 . . . . xxi. 524.

15. It is competent, on an indictment for piracy, for the jury to find, that a vessel within a marine league of the shore, at anchor, in an open roadstead, where vessels only ride under shelter of the land, at a season when the course of the winds is invariable, is upon the high seas. *United States v. Furlong*, 5 W. 184 . . . . iv. 604.

16. The words, "out of the jurisdiction of any particular state," in the act of the 30th of April, 1790, § 8, must be construed to mean out of the jurisdiction of any particular State of the Union. *Ib.*

17. If a libel of information charges a seizure on waters navigable from the sea by vessels of ten or more tons burden, and it appears the seizure was made on land, the court cannot, without an amendment of the information, direct a trial by jury; but it may allow such an amendment as will present a case of seizure on land, which the district court has jurisdiction to try as a court of common law. *The Sarah*, 8 W. 391 . . . . v. 456.

18. The courts of the United States have jurisdiction under the act of the 30th of April, 1790, (1 Stats. at Large, 118,) of murder or robbery committed on the high seas, although not committed on board a vessel belonging to citizens of the United States. *United States v. Holmes*, 5 W. 412 . . . . iv. 683.

19. Such jurisdiction existed, if the vessel had no national character, and whether the prisoners or the deceased were citizens of the United States or not, and whether the offence was committed on board any vessel, or in the sea. *Ib.*

20. Where it did not appear that a privateer had any commission, or any ship's papers, it was held that the burden was on the prisoners to show her national character. *Ib.*

21. By the 8th section of the crimes act of April 30, 1790, (1 Stats. at Large, 113,) congress has not conferred jurisdiction on the circuit court to try an indictment for a murder committed on board a ship of war, lying in the harbor of Boston, within the jurisdiction of the State of Massachusetts. *United States v. Bevans*, 3 W. 336....iv. 231.

22. It is not the offence committed, but the place in which it was committed, which must be out of the jurisdiction of a State, to bring the case within the jurisdiction of the courts of the United States. *Ib.*

23. Under the crimes act of 1790, April 30, § 12, (1 Stats. at Large, 115,) the circuit court has not jurisdiction to punish the crime of manslaughter committed in a river within the jurisdiction of a foreign sovereign. *United States v. Wiltberger*, 5 W. 76....iv. 574.

24. If a statute merely requires an inquisition to be returned to, and recorded by the clerk of a court, the court has no jurisdiction over it. *Custiss v. Georgetown and Alexandria Turnpike Co.* 6 C. 233....ii. 383.

#### G. OF CONCURRENT JURISDICTIONS.

1. In all cases of concurrent jurisdiction, the court which first has possession of the subject, must determine it conclusively. *Smith v. M'Iver*, 9 W. 532....vi. 169.

2. A citizen of Kentucky can maintain a bill in the circuit court of the United States in Pennsylvania, against citizens of the latter State, who are assignees of an insolvent corporation, to establish his demand against the assets in their hands, and have such satisfaction therefrom as he may be equitably entitled to, although the proceedings of the assignees are placed by the law of Pennsylvania in some particulars, under the control of a state court, and the assignees have actually come under that jurisdiction. *Shelby v. Bacon*, 10 H. 56....xviii. 296.

3. Where two tribunals have concurrent jurisdiction, the one which first obtains possession of the subject must adjudicate, and neither party can be forced into another jurisdiction; but here the state court had not obtained possession of the subject-matter of this bill, namely, the validity and extent of the complainant's claim on the assets of the corporation in the hands of the defendants. *Ib.*

4. Where coördinate liens are obtained by one judgment in a State, and another in a United States court, the seizure by a sheriff, under an execution on the state judgment, gave priority to the lien of that judgment. *Pulliam v. Osborne*, 17 H. 471....xxi. 618.

5. The first levy on property, whether made under the jurisdiction of the United States or of a State, withdraws the property from the reach of process from the other jurisdiction. *Hagan v. Lucas*, 10 P. 400....xii. 172.

6. Property, levied on by a sheriff in Alabama, and claimed by a third person, not a party to the execution, who has given a bond to redeliver it to the sheriff when the title has been tried, and who has taken the other steps to try his title, provided for by the law of that State, is still in the custody of the law of the State, so that it is not open to a levy by the marshal of the United States. *Ib.*

7. One having a judgment lien on land of his debtor, which is in the posses-

sion of a receiver, appointed by a court of chancery under a bill by a creditor against the debtor and a third person, to set aside a conveyance to the latter upon the ground of fraud as against creditors, cannot proceed to levy his execution, if he have notice of the fact that the property is in the custody of the law; he must apply to the court of chancery, which will take care to protect his interest, in making a sale, or in distributing the proceeds. *Wiswall v. Sampson*, 14 H. 52....xx. 32.

8. If the judgment creditor after making his levy, does apply to the court of chancery, and pray that effect may be allowed to his title, and the court adjudges his title invalid, this is *res judicata*, and binds his title in an action of ejectment. *Ib.*

9. Where a lien exists by special mortgage on property in Louisiana, and, the mortgagor being dead, the property is in the course of administration in the probate court, the circuit court of the United States has jurisdiction to enforce a sale under the mortgage in favor of a citizen of some other State than Louisiana. *Erwin v. Lowry*, 7 H. 172....xvii. 76.

10. Where executions issue from a state court, and from a court of the United States, if there be no lien by judgment, the one under which a seizure is first made, must prevail and hold the property. *Brown v. Clarke*, 4 H. 4....xvi. 3.

## H. OF INFERIOR, LIMITED, AND GENERAL JURISDICTIONS.

### COURTS OF THE UNITED STATES, B. a. 1.

1. What are inferior courts, of limited and special jurisdiction. *Grignon's Lessee v. Astor*, 2 H. 319....xv. 125.

2. The judgments of the courts of the United States are not void, because the record does not show jurisdiction; they are only voidable by writ of error. *Ex parte Watkins*, 3 P. 193....viii. 370.

3. Every reasonable presumption is to be made in favor of a judgment or decree of a court of general jurisdiction. *Pennington v. Gibson*, 16 H. 65....xxi. 30.

4. In summary proceedings, where a court exercises an extraordinary power under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction, ought to appear on the face of the record. Otherwise, the proceedings are not merely voidable, but absolutely void, as being *coram non judice*. *Thatcher v. Powell*, 6 W. 119....v. 30.

5. The judgments and decrees of circuit courts are binding until reversed, though the record does not show jurisdiction. *Kennedy v. Georgia State Bank*, 8 H. 586....xvii. 714.

6. The inferior court of common pleas of the State of New Jersey, having general jurisdiction in cases of treason, was not, technically, an inferior court, and its judgment of forfeiture, though erroneous, cannot be disregarded while unreversed. *Kempe's Lessee v. Kennedy*, 5 C. 173....ii. 223.

7. Erroneous judgments of an inferior court, which has exceeded its jurisdiction, are void; those of other courts only voidable. *Ib.*

### JUDGMENTS, &c. G. 2.

**L HOW, WHEN, AND BY WHOM A WANT OF JURISDICTION MAY OR MAY NOT BE SHOWN, AND OF ITS CONSEQUENCES WHEN SHOWN.**

JUDGMENTS, &c. B. 3; PLEADING, H.; PRACTICE, L. E. 2.

1. If a circuit court entertain an appeal from a district court without jurisdiction, this court, on appeal, will reverse the decree of the circuit court. *United States v. Nourse*, 6 P. 470....x. 195.

2. A denial of the citizenship of the plaintiff, contained in a general answer to a bill in equity cannot be noticed by the court. It must be pleaded to the jurisdiction. *Livingston v. Story*, 11 P. 351....xii. 456.

3. Where the record shows that the defendant appeared by attorney, this fact cannot be controverted in an action in which the judgment comes in question only collaterally. If voidable for want of notice, inasmuch as on its face it is valid, it should have been avoided by some appropriate direct proceeding to reverse it. *Landes v. Brant*, 10 H. 348....xviii. 418.

4. Where a county court had jurisdiction to order a sale of a decedent's estate, on the representation and finding of certain facts, and the record showed that a petition was presented and the order made. *Held*, that the granting of the license was a binding adjudication that all facts necessary to give jurisdiction, as well as to warrant the license, existed, and that the record was conclusive evidence thereof. *Grignon's Lessee v. Astor*, 2 H. 319....xv. 125.

5. An appearance for a party not served, by counsel who has no authority to waive process and defend the suit, does not bind the party, and the judgment or decree is a nullity. *Shelton v. Tiffin*, 6 H. 163....xvi. 643.

6. Such want of authority may be proved by the attorney himself. *Id.*

7. If the record contains proper averments of citizenship to give a circuit court of the United States jurisdiction, a title made by the marshal under the judgment, cannot be attacked collaterally by proof that the averments as to citizenship were not true, and so that the court had not jurisdiction. *Erwin v. Lowry*, 7 H. 172....xvii. 76.

8. The decision of the board of commissioners under the act of July 4, 1836, § 18, respecting their own jurisdiction, is not conclusive. *Wilson v. Rousseau*, 4 H. 646....xvi. 225. *Wilson v. Turner*, 4 H. 712....xvi. 276.

9. An appellant cannot object that another respondent, who has not appealed, was not liable to be sued in the courts of the United States by the complainant. *Shelton v. Tiffin*, 6 H. 163....xvi. 643.

10. A judgment, *in personam*, recovered without any notice, and without any attachment of property on *mesne process*, though authorized by a law of the territory of Iowa, is a nullity. *Webster v. Reid*, 11 H. 437....xviii. 678.

11. A suit in equity was brought against the unknown heirs of a person who was alleged to have held the legal title in trust for the complainant, and notice having been published in certain newspapers, calling on such heirs to appear, the bill was taken for confessed, and a decree made for the complainant. *Held*, that as the statute authorized such notice only when the complainant claimed as locator, or by an instrument in writing, and the complainant did not so claim, the decree was made without notice, the court had not jurisdiction and the decree was merely void. *Hollingsworth v. Barbour*, 4 P. 466....ix. 150.



12. The jurisdiction of a county court may be inquired into by a circuit court of the United States when the proceedings of the former are relied on in the latter; and if no jurisdiction existed the proceedings are void. *Elliott v. Piersol*, 1 P. 328....vii. 601.

13. A publication of notice to absent defendants having been made only for eight weeks, when the law required two calendar months, *held*, that such absent defendant's title was not affected by the decree. *Hunt v. Wickliffe*, 2 P. 201....viii. 85.

14. A judgment rendered against one as administrator, who is not such, is void, and the levy of an execution issuing on such judgment passes no title to the property levied on. *Griffith v. Frazier*, 8 C. 9....iii. 1.

15. The judgment of a court-martial, in a case not within its jurisdiction, does not protect the officer who executes it. *Wise v. Withers*, 8 C. 381....i. 597.

BANKRUPT LAWS, D. 5; JUDGMENTS, &c. A. 8.

## JURY.

A. PROVINCE OF THE COURT AND OF THE JURY, 303.

B. ORGANIZATION OF JURY, 305.

C. RIGHT OF TRIAL BY, AND NO RE-EXAMINATION OF FACT  
SAVE ACCORDING TO COMMON LAW, 306.

D. OTHER MATTERS, 306.

### A. PROVINCE OF THE COURT AND OF THE JURY.

#### INSTRUCTIONS TO JURY; PATENT, C. 2.

1. Though the decision of questions of fact belongs to the jury, yet when the court is asked for instructions based upon evidence, it must judge of the relevancy and to some extent of the definiteness and certainty of that evidence, and should avoid giving any instruction upon a question which the evidence does not fairly allow to be raised. *Roach v. Hulings*, 16 P. 319....xiv. 317.

2. It is error for the court to instruct the jury that a part of the evidence in the cause does not warrant them in finding the defendant in fault. It should be left to the jury upon the whole evidence, where there is evidence of fault, to find whether it existed. *Smith v. Condry*, 1 H. 28....xiv. 487.

3. An instruction which has the effect to withdraw from the jury any matter of fact which is open on the evidence, is erroneous. *Jewell's Lessee v. Jewell*, 1 H. 219....xiv. 578.

4. The court may give their opinion on matters of fact to the jury, being careful to distinguish between such opinions and those on matters of law; the former being entitled to such influence only as the jury may think proper, the latter being conclusive. *Games v. Stiles*, 14 P. 322....xiii. 479. *Tracy v. Swartwout*, 10 P. 80....xii. 26.



5. Whether evidence is admissible, is for the court; whether it is sufficient, is for the jury; and it is their province to draw from it all such conclusions as it conduces to prove, and which in their judgment it does prove. *Bank of the Metropolis v. Guttschlick*, 14 P. 19....xiii. 322.

6. Though the court, and not the jury, generally, must interpret written documents, yet it may be proper to submit a commercial correspondence to the jury where the language refers to extraneous facts and circumstances, and the meaning of the parties is not clear, on the face of the letters. *Brown v. M'Gran*, 14 P. 479....xiii. 601. *Etting v. Bank of the United States*, 11 W. 59....vi. 511.

7. Where there is no evidence tending to support an issue, the court are bound so to instruct the jury when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence. *Greenleaf v. Birth*, 9 P. 292....xi. 360.

8. When a matter of fact necessary to a defence is controverted, it is error to direct the jury that the matters produced in evidence are sufficient to bar the action, and the jury ought to find for the defendant; for this instruction withdraws the fact from the jury. *United States v. Tillotson*, 12 W. 180....vii. 106.

9. Though it is the duty of the court to construe a deed, it is the duty of the jury to apply its terms when thus construed, to the land, and ascertain whether the premises in question are within the description. *Reed v. Proprietors of Locks and Canals*, 8 H. 274....xvii. 585.

10. Though it may be necessary to leave the meaning and effect of a commercial correspondence to a jury, when it refers to material extrinsic facts, yet the question, whether a letter of advice, which accompanied a bill, showed, on its face, a drawing against a particular consignment, was for the court. *Turner v. Yates*, 16 H. 14....xxi. 11.

11. The defendant having written a letter to his agent, headed "confidential," and the agent having shown it to the plaintiffs, in an action for a false representation made by the letter, it was held to be a question for the jury whether the defendant intended his agent should exhibit the letter. *Iasigi v. Brown*, 17 H. 188....xxi. 444.

12. When the intent with which an act was done is material, the jury must pass on it. *Lee v. Lee*, 8 P. 44....xi. 20.

13. Under the 71st section of the collection act of 1799, (1 Stats. at Large, 678,) the judge, and not the jury, determines whether probable cause for the prosecution has been shown. *Taylor v. United States*, 8 H. 197....xv. 382.

14. When the facts are ascertained, what constitutes due diligence in giving notice to an indorser, is a question of law. *Bank of Alexandria v. Swann*, 9 P. 38....xi. 274.

15. Whether certain declarations by the indorser of a note amounted to a waiver of demand on the maker and notice to the defendant, or to a new promise in consideration of forbearance, are questions of fact for the jury, under instructions from the court, not mere questions of law. *Union Bank of Georgetown v. Magruder*, 7 P. 287....x. 491.

16. Presumptions from evidence are generally mixed questions of law and fact. When they are so, the court cannot tell the jury they are at liberty to

make them, if the evidence is irrelevant or legally insufficient. *Bank of the United States v. Corcoran*, 2 P. 121....viii. 44.

17. Where mere presumptive evidence has been given, the jury must pass upon it. *Chirac v. Reinecker*, 2 P. 613....viii. 280.

18. The question whether an alteration was made in a deed is for a jury; whether an alteration, if made, was material, is for the court. *Steele's Lessee v. Spencer*, 1 P. 552....vii. 694.

19. If it is alleged that the voyage was broken up, and the vessel sold to pay salvage without necessity, this involves matter of fact for the jury. *Marine Ins. Co. of Alexandria v. Tucker*, 8 C. 357....i. 605.

20. It is the province of the court to decide the law, and of the jury to decide the facts. *Georgia v. Brailsford*, 3 D. 1....i. 71.

21. What is a reasonable time for abandonment is a question for a jury under the direction of the court. *Chesapeake Ins. Co. v. Stark*, 6 C. 268....ii. 397. *Maryland Ins. Co. v. Ruden's Administrator*, 6 C. 338....ii. 426. *Livingston v. Maryland Ins. Co.* 7 C. 506....ii. 648.

22. Whether a certain state of facts, justifies the master in breaking up a voyage, and if so, whether the cause is a peril within the policy, are questions of law. *King v. Delaware Ins. Co.* 6 C. 71....ii. 322.

23. The question of materiality of the time of sailing, to the risk, is a question of fact for the jury. *M'Lanahan v. Universal Ins. Co.* 1 P. 170....vii. 518.

24. So are the questions, whether an omission to state the time was fraudulent, and whether it misled the underwriter. *Ib.*

25. When the facts, upon which the question of due diligence depends, are ascertained, whether due diligence was used, is a question of law. *Rhett v. Poe*, 2 H. 457....xv. 167.

26. It is a question of fact whether the guarantor had reasonable notice of the failure of the principal debtor to pay. *Lawrence v. Mc Calmont*, 2 H. 426....xv. 178.

27. The court is not bound to give a construction to an ambiguous answer to a question in a deposition, upon the request of the jury. *Marine Ins. Co. of Alexandria v. Young*, 5 C. 187....ii. 226.

CONTRACT, F. 23, 24; EXCEPTIONS, A. 16; INSURANCE, E. 2.

## B. ORGANIZATION OF JURY.

1. After a juror is sworn, no exception can be taken to him by a party, on account of his being an inhabitant of another county. *Mima Queen v. Hepburn*, 7 C. 290....ii. 535.

2. If a juror be challenged for favor, and upon examination before the triors, he declare that, if the evidence should be equal, he should give a verdict in favor of that party upon whom the burden of proof lies, the court, in the exercise of a sound discretion, ought to reject him, although the bias should not be so strong as to render it positively improper to allow him to be sworn. *Ib.*

3. If a juror become physically unable to act, after a case is opened by the

plaintiff's counsel, it is within the discretion of the court to treat the withdrawal of the juror as a vacancy in a still existing panel, or as breaking up the panel, if the plaintiff does not object, and the defendant, though objecting, does not make known to the court his desire to be restored to any right of challenge of the remaining eleven jurors. *Silsby v. Foote*, 14 H. 218....xx. 143.

### C. RIGHT OF TRIAL BY, AND NO RE-EXAMINATION OF FACT SAVE ACCORDING TO COMMON LAW.

1. The 7th amendment of the constitution of the United States does not prevent parties from waiving their right to a trial by jury. *Parsons v. Armor*, 8 P. 413....viii. 467.

2. A law of the territory of Iowa, which prohibited the trial by jury of certain actions at law, founded on contract, to recover payment for services, was void. *Webster v. Reid*, 11 H. 437....xviii. 678.

### D. OTHER MATTERS.

#### JURISDICTION, A. d. 6.

1. Though the record does not show who the jury were, or how many, or whether they were sworn, still, the presumption, *omnia rite esse acta*, exists. *Stockton v. Bishop*, 4 H. 155....xvi. 65.

2. Though no absolute rule is laid down, concerning the exclusion of the testimony of jurors as to misconduct in the jury-room, the court examined the evidence in this case, and held it did not show ground for a new trial. *United States v. Reid*, 12 H. 361....xix. 180.

3. Jurors in the circuit court for the district of Pennsylvania, are entitled to the fee of one dollar and twenty-five cents per diem, for their attendance. *Ex parte Lewis*, 4 C. 433....ii. 162.

## LACHES.

LIMITATIONS, G.; UNITED STATES, B.

## LANDLORD AND TENANT.

LEASES AND TERMS FOR YEARS.

## LANDS.

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LARCENY.

CRIMINAL LAW, A.

LAW OR FACT.

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LAW OF NATIONS.

ADMIRALTY, A. ; AMBASSADOR; CAPTURE; CONFLICT OF LAWS; TREATIES.

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- E. OF CHANGE OF SOVEREIGNTY AND ITS CONSEQUENCES; HOW MADE, AND ITS RECOGNITION BY OTHER NATIONS 312.

A. THE SOURCES OF THIS LAW, AND ITS DEFINITION.

ADMIRALTY, A.

1. The principles of reason and justice, which constitute the unwritten law of nations, are, in some degree, fixed and rendered stable by judicial decisions. *Thirty Hogsheads of Sugar v. Boyle*, 9 C. 191 . . . .iii. 327.

2. The prize law of Great Britain has continued to be our prize law, so far as it is adapted to our condition, and has not been varied by any power competent to change it; and, consequently, decisions of questions of prize in that country will be received with respect here, though not binding as authority. *Id.*

B. THE LEGISLATIVE AND JUDICIAL POWER OF NATIONS, AND WITHIN WHAT LIMITS AND AS TO WHAT SUBJECTS TO BE EXERCISED.

FOR RIGHT TO TRY QUESTIONS OF CAPTURE IN VIOLATION OF OUR NEUTRALITY, see ADMIRALTY, A. 2; CAPTURE, E.

1. The municipal laws of one nation do not extend, in their operation, beyond its own territory, except as regards its own citizens. A seizure for the breach

of the municipal laws of one nation, cannot be made within the territory of another. *The Apollon*, 9 W. 362....vi. 88.

2. One nation cannot execute the penal laws of another, and consequently a foreign vessel, engaged in the slave-trade, cannot lawfully be captured by an American cruiser. *The Antelope*, 10 W. 66....vi. 337.

3. No foreign power can rightfully erect any court of judicature within the United States, unless by force of a treaty. *Glass v. Sloop Betsey*, 3 D. 6....i. 74.

4. The admiralty jurisdiction exercised by consuls of France, in the United States, is not of right. *Ib.*

5. Nations may prevent the violation of their laws by seizures on the high seas, in the neighborhood of their coasts, and there is no fixed rule prescribing the distance from the coast, within which such seizures may be made. *Church v. Hubbard*, 2 C. 187....i. 470.

6. To come within such an exception, the seizure must be justifiable under the laws of the country making the seizure. *Ib.*

7. A foreign condemnation, for breach of a municipal regulation, is valid, though the seizure is alleged and proved, in a collateral action here, to have been made on the high seas. *Hudson v. Guestier*, 6 C. 281....ii. 406.

8. A foreign sentence of a competent court, though avowedly contrary to the law of nations, is valid, here, because not examinable. But congress might make it examinable by our courts, if it thought fit. *Williams v. Armroyd*, 7 C. 423....ii. 603.

9. A seizure for the breach of a municipal regulation, made within the territorial jurisdiction of the sovereign, being valid, and conferring possession on the sovereign, his courts may proceed to sentence, though the *res* be lying in a port of another friendly power. *Hudson v. Guestier; Lafont v. Bigelow*, 4 C. 293....ii. 107.

10. A public armed vessel, in the service of a sovereign at peace with the United States, is not within the ordinary jurisdiction of our tribunals while in a port of the United States. *Schooner Exchange v. M'Faddon*, 7 C. 116....ii. 478.

11. But the sovereign power of the United States may interpose, and impart such a jurisdiction. *Ib.*

12. Belligerent rights may be superadded to those of sovereignty. To which class any particular act belongs, the nature of the law and the proceedings under it, must determine. *Rose v. Himely*, 4 C. 241....ii. 87.

13. In this case, from the nature of the laws under which the seizure was made, they are territorial regulations, proceeding from the sovereign power, and intended to enforce sovereign rights, and the tribunal professing to execute them, must be considered as acting as an instance and not as a prize court. *Ib.*

14. Whatever may be the municipal law under which a tribunal acts, if it exercise a jurisdiction which its sovereign is not allowed by the laws of nations to confer, its decrees must be disregarded, out of the dominions of its sovereign. *Ib.*

15. The seizure, *de facto*, out of his dominions, will not give jurisdiction to a sovereign over a thing never brought within them. *Ib.*

16. He cannot authorize a seizure, on the high seas, for a breach of a municipal regulation. *Ib.*

17. The sentence in this case being void, the property was not changed ; but the property having been brought to this country, which was its destination, the libellant must allow for freight, duties, insurance, and such other charges as would have been borne by them if importers. *Ib.*

18. It is firmly settled that if captures are made by vessels which have violated our neutrality acts, the property may be restored, if brought within our territory. *The Gran Para*, 7 W. 471 . . . v. 302.

19. A vessel armed and manned in one of our ports, and sailing thence to a belligerent port, with the intent thence to depart on a cruise with the crew and armament obtained here, and so departing and capturing belligerent property, violates our neutrality laws, and her prizes coming within our jurisdiction will be restored. *Ib.*

20. A *bonâ fide* termination of the cruise for which the illegal armament was here obtained, puts an end to the disability growing out of the violation of our neutrality laws, which does not attach indefinitely ; but a colorable termination has no such effect. *Ib.*

21. Restitution decreed to the Spanish owners of property captured in violation of our neutrality laws. (1 Stats. at Large, 383, 497 ; 3 Stats. at Large, 370, 447.) *The Santa Maria*, 7 W. 490 . . . v. 306.

22. If property, captured in violation of our neutrality laws, is found in the hands of the master of the capturing vessel, it is immaterial whether a condemnation has intervened, or what changes of title have occurred. *The Arrogante Barcelones*, 7 W. 496 . . . v. 307.

23. If a privateer of another nation is recaptured by one of our privateers, and libelled for salvage, a court of admiralty cannot entertain jurisdiction to give damages against the foreign privateer, for an alleged tortious capture of a vessel belonging to citizens of the United States, though such vessel is no longer in the possession of the foreign captor, and therefore cannot be proceeded against in his own courts. *L'Invincible*, 1 W. 238 . . . iii. 532.

24. The case of *Del Col v. Arnold*, 3 D. 336, questioned. *Ib.*

25. The government of the United States having recognized the existence of a civil war between Spain and her colonies, our courts are bound to recognize as lawful those acts which war authorizes, and the new governments in South America may direct. Captures made under their commissions, must be treated by us like other captures. Their legality cannot be determined in our courts, unless made in violation of our neutrality. *The Divina Pastora*, 4 W. 52 . . . iv. 345.

26. The cases of *The Cassius*, 3 D. 121, and *The Invincible*, 1 W. 288, decide that neither a public vessel of another nation, nor its officers, are liable to answer in our courts for a capture on the high seas ; but do not touch the jurisdiction over her prizes lying in our ports, which extends to libels *in rem* for restitution of such prizes made in violation of our neutrality, either by a public or private armed vessel. *The Santissima Trinidad and The St. Ander*, 7 W. 283 . . . v. 268.

27. A foreign public vessel is exempted from the jurisdiction of our courts, by an exception grounded on common usage and public policy ; but this excep-

tion does not extend to her prizes, or captured goods, landed here which are liable to the jurisdiction of our courts for the purpose of inquiry and restitution, if a case for it is made. *Ib.*

28. Condemnation by a belligerent's court of prize may pass while the property is lying in a neutral port, if in the possession of the captors there; yet if the property has been arrested by process issuing out of a court of admiralty of the neutral country where the property is, and the possession of the captors has been thus divested, a subsequent condemnation is not valid. *Ib.*

29. Restitution to Portuguese owners decreed, the property having been captured in violation of our neutrality laws. *The Monte Allegre and The Rainha de los Anjos*, 7 W. 520 .v. 309.

30. A capture made by a belligerent, whose force has been augmented in violation of our neutrality laws, during the cruise immediately succeeding such violation, presents a case for restitution by our courts. *The Santissima Trinidad and The St. Ander*, 7 W. 283 . . . v. 268.

AGENT, I. 3, 4; JURISDICTION, F. 11, 18-20, 23; PIRACY, 2, 5, 8, 12, 15-17.

### C. THE RIGHTS, POWERS, AND DUTIES OF BELLIGERENTS.

BLOCKADE, CAPTURE, C. D. E. F.; EVIDENCE, B. 1; TRADING WITH OR UNDER LICENSE OF ENEMIES.

1. The right of search is a belligerent right only. *The Antelope*, 10 W. 66 . . . vi. 337.

2. The right of search is not a right wantonly to vex or control neutral commerce, or indulge idle curiosity; but it grows out of, and is ancillary to, the right of capture; and can never arise except as a mean to that end. *The Nereide*, 9 C. 388 . . . iii. 392.

3. The right of visitation and search is a belligerent right which cannot be drawn into question, but must be conducted with as much regard to the safety of the vessel detained, as is consistent with a thorough examination of her character and voyage. *The Anna Maria*, 2 W. 327 . . . iv. 122.

4. To detain for examination, is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets with on the ocean. *The Eleanor*, 2 W. 345 . . . iv. 129.

5. The principal right necessarily carries with it all the means essential to its exercise; among these, may, sometimes, be included the assumption of the disguise of a friend or an enemy, which is a lawful stratagem of war. *Ib.*

6. A capture, made within the neutral territory, is, as between the belligerents, rightful; and its validity can only be questioned by the neutral State. *The Anne*, 3 W. 435 . . . iv. 253.

7. If the captured vessel commence hostilities upon the captor, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought from the neutral sovereign. *Ib.*

8. Though probable cause is not a bar to damages for a mere municipal seizure, unless made so by statute, yet a seizure for piratical aggression is an exercise of a *quasi* belligerent right, and probable cause is a defence, as in prize causes. *The Palmyra*, 12 W. 1 . . . vii. 1.



9. The rules, that neutral bottoms make neutral goods, and that enemies' bottoms make enemies' goods, are not only separable in their nature, but have been generally separated; and they are held, by the United States, to be distinct. *The Nereide*, 9 C. 388....iii. 392.

10. Consequently, a stipulation for the former rule, in a treaty, does not silently introduce the latter. *Ib.*

11. The fact that Spain administers the latter rule as against neutrals, does not authorize this court to retaliate upon Spanish subjects a like departure from the law of nations, without legislation directing it. *Ib.*

12. Neutral muniments, however regular and formal, if colorable only, do not affect belligerent rights. *The Rugen*, 1 W. 62....iii. 465.

13. If, in consequence of the use of a stratagem, the crew of the vessel detained abandon their duty before they are actually made prisoners of war, and the vessel is thereby lost, the captors are not responsible. *The Eleanor*, 2 W. 345....iv. 129.

### PIRACY, 13.

#### D. THE RIGHTS, POWERS, AND DUTIES OF NEUTRALS, AND HEREIN OF THE RIGHTS AND POWERS OF NATIONS IN TIME OF PEACE ON THE HIGH SEAS. (CAPTURE, E. G; TREATIES, A. 3.)

1. An augmentation of the force of a foreign belligerent vessel in a port of the United States, we being neutral, by a substantial increase of her crew, is a breach of our neutrality. *The Santissima Trinidad and The St. Ander*, 7 W. 283....v. 268.

2. A neutral may lawfully ship his goods on board an armed belligerent vessel, and if her force is used in a combat in which he gives no aid, his goods are not affected. *The Nereide*, 9 C. 388....iii. 392.

3. Covering belligerent property by neutral papers, not being so illegal or immoral, that contracts based thereon may not be enforced; *Held*, that money recovered from a foreign government, as compensation for the capture of property so covered, was not so tainted with immorality, or violation of law, that the true owner could not recover it from the ostensible owner, who had received it. *De Valengin's Administrators v. Duffy*, 14 P. 282....xiii. 462.

4. A citizen of the United States, fitting out a vessel in a port of the United States, in order to cruise against a power in amity with the United States, is not protected, by a commission from a belligerent, from punishment for any offence committed against vessels of the United States. *United States v. Furlong*, 5 W. 184....iv. 604.

5. Though the right of search of foreign vessels does not exist in time of peace, yet a cruiser has a right to approach for purposes of observation. *The Marianna Flora*, 11 W. 1....vi. 497.

6. The vessel approached is under no obligation to lie by, but neither has she a right to fire at a cruiser approaching, upon a mere conjecture that she is a pirate; and if this be done, the cruiser may lawfully repel force by force, and capture her. *Ib.*

7. There is no obligation to affirm a flag with a gun by an American cruiser in time of peace. *Ib.*

8. The commander of the cruiser having fairly exercised his discretion, in judging whether the attack upon him was piratical, cannot be held responsible in damages for not having come to the conclusion, which, upon a subsequent judicial investigation, appears to be correct. *Ib.*

9. The African slave-trade is not contrary to the law of nations. *The Antelope*, 10 W. 66....vi. 337.

10. A vessel within a port, blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within that clause of the policy insuring against the "arrests, restraints, and detainments of kings," &c., for which the insurers are liable; and if the vessel so prevented be a neutral, having on board a neutral cargo, laden before the institution of the blockade, the restraint is unlawful. *Olivera v. Union Ins. Co.* 3 W. 183....iv. 193.

11. Detention after search, pronounced to be unjustifiable, under the circumstances of the case. *The Anna Maria*, 2 W. 327....iv. 122.

CAPTURE, F. 3; *Supra*, C. 7; 12.

#### E. OF CHANGE OF SOVEREIGNTY AND ITS CONSEQUENCES, AND HOW MADE, AND ITS RECOGNITION BY OTHER NATIONS.

1. The English possessions, in America, were not claimed by right of conquest, but of discovery, and were held by the king, as the representative of the nation, for whose benefit the discovery was made. *Martin v. Waddell's Lessee*, 16 P. 367....xiv. 345.

2. An adjudication of a Spanish tribunal made after the cession of Louisiana to the United States, but before possession taken, between private parties, is valid. *Keene v. M'Donough*, 8 P. 308....xi. 110.

3. It belongs exclusively to the government to recognize the political existence of new foreign states, and, until it does so, courts must consider the old state of things as remaining. *Gelston v. Hoyt*, 3 W. 246....iv. 211.

4. When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly constituted government, as it is viewed by the legislative and executive departments of the government of the United States. *United States v. Palmer*, 3 W. 610....iv. 314.

5. If that government remains neutral, but recognizes the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. *Ib.*

6. The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of such newly erected government. *Ib.*

7. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal. *Ib.*

8. By the conquest and military occupation of a portion of the territory of the United States, by a public enemy, that portion is to be deemed a foreign

country, so far as respects our revenue laws. *United States v. Rice*, 4 W. 246 . . . .iv. 391.

9. Goods imported into it, are not imported into the United States; and are subject to such duties only as the conqueror may impose. *Ib.*

10. The subsequent evacuation of the conquered territory by the enemy, and resumption of authority by the United States, cannot change the character of past transactions. *Ib.*

11. The *jus postliminii* does not apply to the case; and goods previously imported do not become liable to pay duties to the United States, by the resumption of their sovereignty over the conquered territory. *Ib.*

12. The capture and occupation of Tampico, by the arms of the United States, during the war with Mexico, though sufficient to cause it to be regarded by other nations as part of our territory, did not make it a part of the United States under our constitution and laws; it remained a foreign country, within the meaning of the revenue laws of the United States. *Fleming v. Page*, 9 H. 603 . . . .xviii. 278.

13. An island, conquered and occupied by the enemy, is, for belligerent and commercial purposes, his soil. *Thirty Hogsheads of Sugar v. Boyle*, 9 C. 191 . . . .iii. 327.

14. The produce of that soil is liable to condemnation, while it belongs to the individual proprietor of the soil which produced it, although he is a neutral. *Ib.*

15. This court does not recognize the existence of any lawful court of prize at Galveztown, nor of any Mexican republic or state, with power to authorize captures in war. *The Nueva Anna and Liebre*, 6 W. 193 . . . .v. 57.

16. Though the independence of Buenos Ayres has not been acknowledged by the United States, we have recognized the existence of a state of civil war between Spain and its colonies, and each party to that war is respected by us in its exercise of all belligerent rights, including the right of capture. *The Santissima Trinidad and The St. Ander*, 7 W. 283 . . . .v. 268.

17. A capture of a Spanish vessel and cargo, made by a privateer commissioned by the Province of Carthage, while it had an organized government, and was at war with Spain, cannot be interfered with by the courts of the United States. *The Nuestra Senora de la Caridad*, 4 W. 497 . . . .iv. 453.

18. The capacity of corporations, created by the crown, in this country, or in Great Britain, to hold lands or other property in this country, was not affected by the Revolution. *Society for the Propagation of the Gospel &c., v. New Haven*, 8 W. 464 . . . .v. 483.

19. A woman, residing with her father, a citizen of South Carolina, in Charleston, when that city was captured by the British forces in May, 1780, continued so to reside until 1781, when she was married to a British officer, with whom she went to England in 1782, and there remained until her death in 1801; she left five children born in England. *Held*, 1. That the capture of Charleston did not permanently change the allegiance or the national character of the inhabitants. *Shanks v. Dupont*, 3 P. 242 . . . .viii. 395.

20. 2. That by her marriage with an alien she did not cease to be a citizen of South Carolina. *Ib.*

21. 3. That her withdrawal with her husband, and her permanent adherence to the side of the enemies of the State, down to and at the time of the treaty of

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peace of 1783, operated as a virtual dissolution of her allegiance, and that her coverture did not disable her from making this election. *Ib.*

22. 4. That at all events she was a British subject within the purview of the 9th article of the treaty of 1794, (8 Stats. at Large, 122,) with Great Britain. *Ib.*

### LAWS OF THE SEVERAL STATES.

CONSTITUTIONAL LAW, N. O. P.; COURTS OF THE UNITED STATES, B. b. c.;  
INSOLVENT LAWS, B.; STATE COURTS AND MAGISTRATES.

#### A. OF THE PROCESS ACTS OF THE STATES, 314.

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5. COMMERCIAL LAW.
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#### C. HOW TAKEN NOTICE OF, 320.

##### A. OF THE PROCESS ACTS OF THE STATES.

1. WHAT ADOPTED, AND HOW, AND TO WHAT EXTENT.

1. The process act of May 8, 1792, (1 Stats. at Large, 275,) adopts the laws of the several States concerning the final process of their supreme courts, existing in September, 1789, subject to such alterations as the courts of the United States might deem expedient, or such regulations as the supreme court might prescribe. *Wayman v. Southard*, 10 W. 1....vi. 311.

2. The 3d section of the process act of May 19, 1828, (4 Stats. at Large, 278,) adopts the then existing state laws concerning executions, and operates on all issued subsequent to its passage, without regard to the time when the judgments were rendered. *Ross v. Duval*, 18 P. 45....xiii. 34.

3. The act of May 19, 1828, § 8, adopting the proceedings on executions, embraces as part of those proceedings the rights secured by the then existing laws of the State, to an imprisoned debtor, to have the privilege of the jail limits. *United States v. Knight*, 14 P. 301 . . . . xiii. 470.

4. The process act of 1828, adopted an action of trespass to try titles to land in Alabama, which existed by a law of that State when that act was passed. *Sears v. Eastburn*, 10 H. 187 . . . . xviii. 357.

5. The process act of 1828, adopted so much of the act of the State of Mississippi as authorized a judgment, by motion, against a sheriff for failing to pay over moneys collected on execution, and this is a proceeding in the original suit, over which a circuit court there has jurisdiction, though the plaintiff and the marshal are both citizens of the same State. *Gwin v. Breedlove*, 2 H. 29 . . . . xv. 16.

6. The penal clauses of the act are not adopted. *Ib.*

7. The forthcoming bond, in Mississippi, is part of the proceedings upon the final process, and, as such, adopted by the act of May 19, 1828. *Amis v. Smith*, 16 P. 308 . . . . xiv. 311.

8. Though the forms and modes of proceeding under writs of execution in the State have been adopted by congress, they are not controlled by collateral restrictions which the State has imposed on its courts, and, though an injunction, by a state law, may operate as a *supersedeas*, this does not govern executions from the courts of the United States. *Boyle v. Zacharie*, 6 P. 648 . . . . x. 297.

## 2. WHAT NOT ADOPTED.

1. Statutes of Kentucky in relation to executions, passed after September 29, 1789, are not applicable to executions issuing from courts of the United States. *Wayman v. Southard*, 10 W. 1 . . . . vi. 311.

2. The act of assembly of Kentucky, which prohibits the sale of property taken under executions for less than three fourths of its appraised value, without the consent of the owner, does not apply to a *venditioni exponas* issued out of the circuit court for the district of Kentucky. *Bank of the United States v. Halstead*, 10 W. 51 . . . . vi. 329.

## 3. WHAT MODIFIED, AND HOW.

In the district of Connecticut, the marshal may, upon an attachment for debt, without a *mittimus*, commit the defendant to prison for want of bail. *Palmer v. Allen*, 7 C. 550 . . . . ii. 667.

## COURTS OF THE UNITED STATES, B. e. 1.

### 4. GENERALLY.

1. State laws, *proprio vigore*, cannot affect the process or proceedings of the courts of the United States. *Beers v. Haughton*, 9 P. 329 . . . . xi. 376.

2. A statute of a State, *proprio vigore*, cannot affect the modes of proceedings in a court of the United States. It is obligatory only so far as adopted by

congress, or by the court, under the authority of congress. *Keary v. Farmers and Merchants' Bank of Memphis*, 16 P. 89....xiv. 195.

**B. LAWS OF THE STATES WHICH ARE OR ARE NOT RULES OF DECISION UNDER THE 34TH SECTION OF THE JUDICIARY ACT OF 1789, (1 STATS. AT LARGE, 92.)**

**1. GENERALLY, AND HEREIN OF ACTS OF LIMITATIONS, RULES OF EVIDENCE, AND OTHER MATTERS.**

1. The 34th section of the judiciary act relates to the rules for forming, not for executing the judgment. *Wayman v. Southard*, 10 W. 1....vi. 311.

2. A statute of a State, barring all actions at law against the executors and administrators of estates judicially declared insolvent, cannot be pleaded as a bar to an action by a citizen of another State, in a circuit court of the United States. *Suydam v. Broadnax*, 14 P. 67....xiii. 350.

3. The courts of the State of Ohio, having settled that a book, entitled "The Land Laws of Ohio," published by authority of that State, was admissible in evidence, and proof of a grant from the United States to John C. Symmes and his associates, the circuit court in Ohio rightly followed that rule of evidence. *Hinde v. Vattier's Lessee*, 5 P. 398....ix. 397.

4. The act of Virginia, passed in 1792, to regulate proceedings on judgments, is substantially an act of limitation, and is one of the laws of the State, to be applied in the courts of the United States, according to the 34th section of the judiciary act, although one of its provisions regulates the issue of executions. *Ross v. Duval*, 13 P. 45....xiii. 84.

5. The statute of limitations of Georgia may be pleaded in bar of an action brought in the circuit court of the United States for the district of Georgia, on a judgment recovered in South Carolina. *M'Elmoyle v. Cohen*, 13 P. 312....xiii. 169.

6. The local laws of the States cannot give jurisdiction to the courts of the United States; they may ascertain the rights of the parties. *Steamboat Orleans v. Phœbus*, 11 P. 175....xii. 391.

7. Under the 34th section of the judiciary act, the acts of limitations of the several States, where no special provision has been made by congress, form rules of decisions in the courts of the United States, and the same effect is given to them as is given to them in the state courts. *M'Oluny v. Silliman*, 8 P. 270....viii. 415.

8. A state statute of limitations barring "all actions on the case," bars an action on the case against an officer of the United States for non-feasance in office. *Ib.*

9. The rules of evidence prescribed by the laws of the State are to be administered by the circuit court sitting in the State, in a trial of a civil action at the common law. *Sims v. Hundley*, 6 H. 1....xvi. 580.

10. Under the 34th section of the judiciary act, the statutes of the several States which prescribe rules of evidence in civil cases are included. *M'Niel v. Holbrook*, 12 P. 84....xii. 648.

2. STATE CONSTITUTIONS, STATUTES, AND THEIR CONSTRUCTION BY STATE COURTS. (CONSTITUTIONAL LAW, D. 1.)

1. A judicial interpretation by the highest court in the State of one of its own statutes, not called in question by its own tribunals, and no other decision tending in any manner to shake it, is conclusive here. *M'Cutchen v. Marshall*, 8 P. 220 . . . . xi. 76.

2. In cases depending on the statutes of a State, and especially concerning land, the settled construction of those statutes, by the state court, is to be adopted. *Polks' Lessee v. Wendell*, 9 C. 87 . . . . iii. 276.

3. In construing a statute of a State concerning lands, this court adopts the construction settled in the state courts, though not in accordance with its own opinion. *M'Keen v. Delancy's Lessee*, 5 C. 22 . . . . ii. 181.

4. If the construction of a state statute is settled by the highest court of the State, this court adopts that construction. *Elmendorf v. Taylor*, 10 W. 152 . . . . vi. 360.

5. The construction of a statute of a State affecting titles to land, by the highest court of a State, is entitled to peculiar respect. *M'Dowell v. Peyton*, 10 W. 454 . . . . vi. 474.

6. In construing local statutes respecting real property, this court is governed by the decisions of the state tribunals. *Thatcher v. Powell*, 6 W. 119 . . . . v. 30.

7. The power of an inferior court of a State to make an order at one term as of another, is of a character so peculiarly local, that the judgment thereon of the revising tribunal of the State should be conformed to by this court. *Bank of Hamilton v. Dudley's Lessee*, 2 P. 492 . . . . viii. 192.

8. The settled construction of statutes of limitation by the state courts, will be followed by this court. *Harpending v. Dutch Church*, 16 P. 455 . . . . xiv. 378.

9. The construction of a statute of limitations of Tennessee being well settled by a series of decisions of the highest court of that State, differently from what was understood by this court when it made a former decision, and subsequently thereto, that decision was overruled, and the rule fixed by the state court was adopted. *Green v. Neal's Lessee*, 6 P. 291 . . . . x. 119.

10. This court follows the decision of the highest court of the State, on a question of interpretation of the state statute concerning executions, and reverses the judgment of the circuit court, though that decision was made since the decision of the circuit court. *United States v. Morrison*, 4 P. 124 . . . . ix. 27.

11. In construing the constitution of a State, this court will adopt a settled construction, existing when the contract in question was made, acquiesced in by all the branches of the government, and under the authority of which the contract was entered into, and reject a more recent decision by the highest court of the State, as not affording the rule for such a case. *State Bank of Ohio v. Knoop*, 16 H. 369 . . . . xxi. 190.

12. This court cannot rest its judgment upon an opinion of a state court, concerning the construction of a statute of the State, if it was not necessary to



construe the statute in order to decide the case in which the opinion was pronounced. Under such circumstances, this court must examine the question of construction, and decide it, as seems to them right. *Carroll v. Carroll's Lessee*, 16 H. 275 . . . . xxi. 128.

13. The supreme court of Michigan having settled a question as to the constitutionality of a law of that State depending wholly on the local law this court followed that decision. *Nesmith v. Sheldon*, 7 H. 812 . . . . xvii. 416.

14. The judicial department of a state government is the rightful expositor of its constitutional law, in cases coming here from the circuit court. *Bank of Hamilton v. Dudley's Lessee*, 2 P. 492 . . . . viii. 192.

### 3. RULES OF PROPERTY SETTLED BY STATE COURTS. (ENTAILS.)

A deliberate decision, by the highest court of a State, of the question whether the statute of uses was part of the common law of the State, and as to the operation of a clause in a will of lands, under that law, was received by this court as a rule of property there. *Henderson v. Griffin*, 5 P. 151 . . . . ix. 260.

### 4. CONSTRUCTION AND VALIDITY OF CONTRACTS, DEEDS, AND DEVISES OF LAND.

1. The decision of a state court is not adopted by this court, when it turns on the construction or effect of a compact between two States. *Marlatt v. Silk*, 11 P. 1 . . . . xii. 319.

2. This court having deliberately decided a contract to be valid, declined to reverse its decision, though subsequent thereto, the highest court of the State where the contract was made and to be performed, decided that a similar contract was invalid because prohibited by the constitution of the State. *Rosen v. Runnels*, 5 H. 134 . . . . xvi. 336.

3. The decision of the highest court of a State, construing a deed by the rules of the common law, is not binding on this court. *Foxcroft v. Mallett*, 4 H. 353 . . . . xvi. 143.

4. This court does not hold itself bound by the construction of a will of lands, made by the highest court of a State, unless the construction arises from a settled rule of property. *Lane v. Vick*, 3 H. 464 . . . . xv. 514.

5. This court adopts the decisions of the highest court of a State settling a rule of construction of devises of lands. *Jackson v. Chew*, 12 W. 153 . . . . vii. 94.

### NAVIGABLE WATERS, 3.

### 5. COMMERCIAL LAW.

1. The 34th section of the judiciary act, is limited to the laws of a State strictly local, that is to say, the positive statutes of the State, and their interpretation by the local tribunals, and the rights and titles to things having a

permanent locality, such as real estate; it does not apply to the construction of contracts, or to questions of general commercial law. *Swift v. Tyson*, 16 P. 1....xiv. 166.

2. Questions of general commercial law, concerning the construction and legal effect of a contract of insurance, are not local in their character, and this court are not bound by the decisions of the state courts thereon. *Carpenter v Providence Washington Ins. Co.* 16 P. 495....xiv. 386.

#### 6. CRIMINAL LAW.

1. The 34th section of the judiciary act of 1789, applies only to the trial of civil actions at the common law. *United States v. Reid*, 12 H. 361....xix. 180.

2. In criminal trials in the courts of the United States held in one of the original thirteen States, the admissibility of evidence depends upon the law of the State where the trial is held, as it was, when the courts of the United States were established by the judiciary act of 1789. *Ib.*

#### 7. EQUITY.

1. The circuit court has jurisdiction, on a bill in equity filed by the United States against the debtor of their debtor, they claiming a priority under the act of 1799, (1 Stats. at Large, 676, § 65,) notwithstanding the local law of the State where the suit is brought allows a creditor to proceed against the debtor of his debtor, by a peculiar process at law. *United States v. Howland*, 4 W. 108....iv. 360.

2. The circuit courts of the Union have chancery jurisdiction in every State; they have the same chancery powers, and the same rules of decisions in all the States. *Ib.*

3. Bill to establish the possession and quiet the title of the complainant to lands in Kentucky, sustained. *Wickliffe v. Owings*, 17 H. 47....xxi. 357.

4. The statute in Kentucky upon the subject of this remedy, is not without influence upon the question of the propriety of this exertion of an established chancery power. *Ib.*

5. A state law, authorizing one having both title and possession to bring a suit in equity against one claiming or pretending to title, may be administered by a circuit court; for though the laws of the States cannot affect the jurisdiction, or modes of proceeding in equity of the courts of the United States, they may afford rules as to what shall be deemed a cloud upon title to lands, and the circuit courts, as courts of equity, may remove such clouds. *Clark v. Smith*, 13 P. 195....xiii. 119.

6. A court of the United States sitting in a State where the distinction between law and equity does not exist, may adopt the state proceedings to try suits at law; but equitable rights must be presented and tried according to the rules prescribed by this court for the pleadings and practice in equity. *Bennett v. Butterworth*, 11 H. 669....xviii. 757.

7. The chancery jurisdiction of the courts of the United States is the same

in all the States, and the rule of decision is the same in all. Its remedies are not regulated by the state practice. *Boyle v. Zacharie*, 6 P. 648 . . . x. 297.

8. This court is not bound by the decision of a state court, upon a question of equity law. *Neves v. Scott*, 13 H. 268 . . . xix. 492.

BOND, E. 6; EQUITY, A. 2, 3.

### C. HOW TAKEN NOTICE OF.

The courts of the United States can and should take notice of the laws and judicial decisions of the several States of the Union, and with respect to them, no averment need be made in pleading, which would not be necessary within the respective States. *Pennington v. Gibson*, 16 H. 65 . . . xxi. 30.

## LEASES AND TERMS FOR YEARS.

ESTOPPEL, A. C.; FIXTURES.

1. A lease for one year, followed by an occupation for three years, is not a lease for three years. *Alexander v. Harris*, 4 C. 299 . . . ii. 111.

2. The personal representatives of the lessee are liable on his covenant to pay rent, though he assigned the lease in his lifetime. *Scott v. Lunt's Administrator*, 7 P. 596 . . . x. 584.

3. A fee-farm rent is an estate of inheritance, and the assignee may sue for it in his own name, though the reversion, or the right of reëntry, were not assigned to him. *Ib.*

4. Reëntry for non-payment of rent, can be made at common law only after a demand of the precise sum due, at a convenient time before sunset of the day when the rent was payable, and in the most notorious place upon the land, though no person be on the land to pay. *Connor v. Bradley*, 1 H. 211 . . . xiv. 574.

5. A legatee, in the adverse possession of land of the testator, cannot be compelled to allow rent by way of deduction from his legacy. *West v. Smith*, 8 H. 402 . . . xvii. 636.

6. An attornment by a tenant to one put in possession under a writ of *habere facias*, not calling for the land, is voluntary, and the tenant cannot set up the title of the party in whose favor the execution was, nor is he entitled to notice to quit. *Woodward v. Brown*, 13 P. 1 . . . xiii. 1.

7. A tenant who disputes his landlord's title, and claims the fee in his own right, becomes a trespasser, and may be ejected without notice. *Walden v. Bodley*, 14 P. 156 . . . xiii. 400.

EJECTMENT, C. 7.

## LETTER OF CREDIT.

CONTRACT, D.; FRAUD, D.; GUARANTEE.

## LEGACY.

WILL.

## LEX LOCI

CONFLICT OF LAWS.

## LIBEL.

ADMIRALTY, B. 1.

1. Though a communication be privileged, if it be malicious, an action lies ; but the plaintiff must aver and prove actual malice. *White v. Nicholls*, 3 H. 266....xv. 439.

2. It is not necessary to aver, in the declaration, the facts constituting malice ; it is enough to allege the writing was maliciously published. *Ib.*

3. Want of probable cause will authorize the inference of malice. *Ib.*

4. A letter to the President of the United States, containing charges against one in public office under the executive government, if false and malicious, is actionable. *Ib.*

## LIEN.

EXECUTIONS, D. ; JUDGMENTS AND DECREES, B. ; REVENUE LAWS, E. d. ; VENDOR AND PURCHASER, B.

A. MARITIME LIENS, 321.

B. EQUITABLE LIENS, 321.

C. COMMON LAW AND STATUTE LIENS, 322

## A. MARITIME LIENS.

ADMIRALTY, A. 2 ; BOTTOMRY AND RESPONDENTIA ; SHIPPING, F. H. 1.

## B. EQUITABLE LIENS. (JUDGMENTS, &amp;c. B. 1.)

1. A lien upon certificates of stock cannot arise from a breach of trust. *Randel v. Brown*, 2 H. 406....xv. 157.

2. Though where the legal remedy by the levy of an *elegit* will pay the debt

out of the rents and profits in a reasonable time, the court might refuse to interfere, this has no application to the case of a reversion expectant on a life-estate. *Burton v. Smith*, 13 P. 464....xiii. 250.

3. An agreement to allow an agent five per centum of the amount which should be recovered under a claim on a foreign government, gives a lien on the fund to that extent, and congress having provided for suits to try the title to such funds in the treasury, a court of equity has jurisdiction. *Wylie v. Coxe*, 15 H. 415....xx. 580.

4. The complainant, at the instance of his father-in-law, having entered into possession of a messuage belonging to the former, under a belief that it would be conveyed to him or his wife, and having expended a large sum in improvements, upon the faith of that understanding, but the contract being too uncertain to be specifically executed,—*Held*, that he had an equitable lien on the messuage for his advances, as against creditors of the father-in-law, who had died insolvent. *King's Heirs v. Thompson*, 9 P. 204....xi. 331.

5. A question of fact, whether the appellant had a claim in equity *in personam*, as well as *in rem*. *King v. Thompson's Heirs*, 13 P. 128....xiii. 86.

### C. COMMON LAW AND STATUTE LIENS.

1. In Kentucky, the delivery of a *fi. fa.* to the sheriff, creates a lien on the debtor's lands, which is as valid before as after a levy. *Waller's Lessee v. Best*, 8 H. 111....xv. 325.

2. The act of congress of March 2, 1833, (4 Stats. at Large, 659,) does not secure a lien on a building to one who contracts with the owner of the land to erect the building, but only to mechanics and material-men, who supply materials and perform work on the building. *Winder v. Caldwell*, 14 H. 434....xx. 272.

3. The charter of the Bank of Washington contained a clause that "all debts, actually due and payable by a stockholder requesting a transfer, must be satisfied before such transfer shall be made;" *Held*, 1st. that executors of a stockholder could not have the aid of a court of equity to compel a transfer without first paying a debt due from the testator, though it was not payable at the time of his death; and 2d. That the fact that the testator died insolvent, and indebted to the United States, did not enable the executors, by force of the 5th section of act of March 3, 1797, (1 Stats. at Large, 515,) to assert any other or greater right to the transfer, than they would otherwise have possessed. *Brent v. Bank of Washington*, 10 P. 596....xii. 262.

4. An insurance broker is entitled to a lien on the policy for premiums paid by him on account of his principal; and though he parts with the possession, if the policy afterwards comes into his hands again, his lien is revived, unless the manner of his parting with it manifests his intention to abandon the lien. In such a case, an intermediate assignee takes *cum onere*. *Spring v. South Carolina Insurance Company*, 8 W. 268....v. 411.

5. But in the case of other liens acquired on the policy, if it be assigned, *bonâ fide*, for a valuable consideration, while out of the possession of the person,

acquiring the lien, and afterwards return into his hands, the lien does not revive as against the assignee. *Ib.*

6. The lien of a bank, under its charter, on its shares, for a debt due from their owner, is superior in equity to a lien acquired from the owner by a third person, and is not waived simply by taking other security for the debt. *Union Bank of Georgetown v. Laird*, 2 W. 390....iv. 147.

## BANKS, 4.

## LIMITATIONS.

CONFLICT OF LAWS, L.; EQUITY, B, b. 4, h.; ERROR, A.; PLEADING, C.

## A. ACTIONS TO TRY TITLE TO LAND, 323.

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## A. ACTIONS TO TRY TITLE TO LAND.

1. TO WHAT CASES APPLY; WHEN BEGIN TO RUN, AND WHEN BAR IS COMPLETE.

1. The act of limitations of the State of Georgia, (1767,) does not require an entry within seven years after the title accrued, unless there is an adverse possession. *Shearman v. Irvine's Lessee*, 4 C. 367....ii. 139.

2. Though the entry and possession of one tenant in common is, generally, the entry and possession of all the tenants, yet if one enter on part of the land, under a partition, claiming that part in severalty, his possession is adverse to the co-tenants, and though the partition be invalid, the statute of limitations runs against the co-tenants. *Olymer's Lessee v. Dawkins*, 3 H. 674....xv. 596.

3. The statute of limitations of Pennsylvania, of 1705, is inapplicable to an action of ejectment brought to enforce the unpaid purchase-money, for lands of the proprietaries within the manors for which warrants had issued. Nor is the statute of limitations of 1785 a bar to such an action. *Kirk v. Smith*, 9 W. 241 . . . .vi. 34.

4. In New York, a religious corporation can make defence under the statute of limitations, though not capable by law of taking and holding the lands in question. *Harpending v. The Dutch Church*, 16 P. 455 . . . .xiv. 378.

5. Where one enters in privity with the owner, the statute of limitations does not begin to run, until there is a clear, positive, and open disavowal of his title brought home to his knowledge. *Zeller's Lessee v. Eckert*, 4 H. 289 . . . .xvi. 118.

6. Circumstances which will amount to such a disavowal. *Ib.*

7. Where the defendant in ejectment, for lands in North Carolina, had been in possession under title in himself, and those under whom he claimed, for a period of thirty-three years, such possession is, by the statute of limitations of North Carolina, a conclusive legal bar against the action by an adverse claimant, unless such claimant brings himself by proof within some of the disabilities provided for by that statute. In the absence of such proof, the title shown by the party in possession is so complete as to afford presumptive evidence in an action upon a covenant against encumbrances, that a recovery obtained by the adverse claimant was not by a paramount legal title. *Somerville's Executors v. Hamilton*, 4 W. 230 . . . .iv. 385.

8. Under the statute of limitations of Tennessee, the running of the statute can only be stopped by actual suit, if the party claiming under it has peaceable possession of seven years. *M'Clung v. Ross*, 5 W. 116 . . . .iv. 582.

9. But such a possession cannot exist if the party having the better right takes actual possession in pursuance of his right. *Ib.*

10. The statute of limitations of Tennessee did not begin to run in respect to lands within the disputed territory until the dominion of that State over the lands was settled by compact. *Robinson v. Campbell*, 8 W. 212 . . . .iv. 200.

11. Under the 15th section of the limitation laws of Texas, if the possession of two or more persons in succession, holding in privity with each other, under title or color of title, makes out the prescribed term, the bar is complete, though no one has held for the whole required time; and the 14th section of that law has no effect upon the 15th section. *Christy v. Alford*, 17 H. 601 . . . .xxi. 717.

12. In Massachusetts, the right of entry of a married woman is barred in thirty years, notwithstanding her coverture. *Reed v. Proprietors of Locks and Canals*, 8 H. 274 . . . .xvii. 585.

13. Under the seven years limitation law of Tennessee, the fact that the defendant claims under a grant is not enough; he must connect himself with it by a valid conveyance. *Powell's Lessee v. Harman*, 2 P. 241 . . . .viii. 104.

14. If a grantor make a fraudulent conveyance to an innocent grantee, who enters and claims under it in fee, the statute of limitations runs in his favor. *Gregg v. Sayre's Lessee*, 8 P. 244 . . . .xi. 82.

15. If a party amend his declaration in ejectment by inserting a new count,



laying a demise from a different lessor, the statute of limitations, as against this new title, continues to run till the amendment is made. And if the adverse possession had then been held more than twenty years, and more than ten years since the death of the plaintiff's ancestor, it is a bar. *Sicard's Lessee v. Davis*; *Same v. Cecil*, 6 P. 124....x. 59.

16. Adverse possession with full knowledge of an older and valid title, is a bar under the statute of limitations. *Ewing v. Burnet*, 11 P. 41....xii. 328.

17. The statute of limitations of Illinois, which makes a possession of seven years a bar, in favor of one having a connected title deducible from any officer authorized by the laws of the State to sell such land for non-payment of taxes, does not include a case where the deed from an officer was void on its face, because the requirements of the law were not observed in making the sale; and the officer had no authority, according to the recitals in the deed, to make the sale. *Moore v. Brown*, 11 H. 414....xviii. 665.

18. If parties, having only an equitable right to land, undertake to convey the fee, or if one tenant in common undertake to convey the whole, and the grantee enter into the actual possession, intending to claim the whole, he is not precluded from setting up his possession thus acquired, as a bar, under the statute of limitations, nor from relying on it as preventing a conveyance by the owner out of possession. *Jackson v. Huntington*, 5 P. 402....ix. 399.

19. A purchaser without notice may join his adversary possession to the prior ostensible possession of his grantor, to make a bar under the statute of limitations. *Alexander v. Pendleton*, 8 C. 462....iii. 221.

19 a. An adverse possession of fifty years, with knowledge of a better title, is a bar to that title. *Ib.*

20. The statute of limitations of Kentucky, does not differ essentially from the English statute of the 21st James I. c. 1, and is to be construed as that statute, and all other acts of limitation founded upon it, have been construed. The whole possession must be taken together; when the statute has once begun to run it continues; and an adverse possession under a survey, previous to its being carried into grant, may be connected with a subsequent possession. *Walden v. Heirs of Gratz*, 1 W. 292....iii. 556.

21. Under the act of the legislature of Tennessee, passed in 1797, to explain an act of the legislature of North Carolina, of 1715, a possession of seven years is a bar only when held under a grant, or a deed founded on a grant. *Patton's Lessee v. Easton*, 1 W. 476....iii. 640.

22. The act of assembly vesting lands in the trustees of the town of Nashville, is a grant of those lands, and when the defendant showed no title under the trustees, nor under any other grant, his possession of seven years was held insufficient to protect his title or bar that of the plaintiff under a conveyance from the trustees. *Ib.*

23. By the statute of limitations of Tennessee, of 1797, a possession of seven years is a protection only when held under a grant, or under mesne conveyance, which connect it with a grant. *Walker v. Turner*, 9 W. 541....vi. 174.

24. A sheriff's deed, which is void for want of jurisdiction in the court under whose judgment the sale took place, is not such a conveyance that a possession under it will be protected by the statute of limitations. *Ib.*

25. In Louisiana, the dissolution of a contract passing the title to real estate on a condition subsequent, cannot be inferred, merely from the fact of a subsequent conveyance from the grantor; nor does such a conveyance, alone, give a possession, which will cause a prescriptive title to begin, as against the first grantee. *Anderson v. Bock*, 15 H. 323....xx. 542.

26. By the law of Arkansas, five years' possession under an invalid deed from a tax collector, is a bar to an action by the true owner. *Pillow v. Roberts*, 13 H. 472....xix. 597.

ESTOPPEL, C. 2; PUBLIC LANDS OF THE UNITED STATES, IV. A. 8.

## 2. EXCEPTIONS AND DISABILITIES.

1. Though "beyond seas," in the statute of limitations of Maryland, means out of the jurisdiction of the State, this interpretation does not apply to that statute, in force in the District of Columbia, so as to render that part of the District, ceded by Virginia, beyond seas, within its meaning. *Bank of Alexandria v. Dyer*, 14 P. 141....xiii. 393.

2. The saving clause in the New York act, limiting writs of right, does not allow for cumulative disabilities. *Thorp v. Raymond*, 16 H. 247....xxi. 113.

3. The terms "beyond seas" in the proviso or saving clause of the statute of limitations of Georgia, are equivalent to without the limits of the State where the statute is enacted. *Murray's Lessee v. Baker*, 3 W. 541....iv. 286.

4. The want of evidence necessary to support a title, is not a disability to sue, within the meaning of the statute of Tennessee. *M'Iver v. Rugan*, 2 W. 25....iv. 10.

5. A foreign corporation, all the members of which are beyond seas, is within the exception of a statute of limitations. *Society for the Propagation of the Gospel, &c. v. Pawlet*, 4 P. 480....ix. 160.

6. Construction of the statutes of limitation for the State of Vermont. *Ib.*

7. If an infant be disseised and then marry, her disability as a *feme covert* does not relieve her from bringing a suit within ten years after she becomes of full age, under the statute of limitations of Virginia. The only disability provided for is what existed when the right of action accrued. *Mercer's Lessee v. Selden*, 1 H. 37....xiv. 491.

8. Under the statute of limitations of Virginia, an heir has ten years within which to bring his action, if the entry of the ancestor, who was under disability at the time of his death, was not barred. *Ib.*

## B. ASSUMPSIT AND DEBT ON SIMPLE CONTRACTS.

### 1. TO WHAT CASES APPLY; WHEN BEGIN TO RUN, AND WHEN BAR IS COMPLETE.

1. As to when the act of limitations of Virginia is not a bar, see *Hopkirk v. Bell*, 4 C. 164....ii. 56.

2. An agreement in writing, for a valuable consideration, to extend the time of payment of notes, already payable. and to receive payment at certain times

therein specified, stops the running of the statute of limitations until the expiration of the extended terms of credit. *Randon v. Toby*, 11 H. 498....xviii. 694.

3. If a consignee render to the consignor an account of sales, and the consignor receives it without objection, and claims the balance, the account becomes thereby stated, and the statute begins to run. *Toland v. Sprague*, 12 P. 300....xii. 729.

4. The cause of action against an attorney, for negligence in not bringing an action on a note left with him for collection, or for bringing the action in a wrong name, accrues to the creditor by and at the date of such negligence, and the statute of limitations then begins to run, though the actual damage from the negligence is not suffered till afterwards. *Wilcox v. Plummer's Executors*, 4 P. 172....ix. 48.

5. The Maryland statute of limitations of three years is a good bar to an action of assumpsit, for money had and received, brought to try a title to lands in the city of Washington, under the 5th section of the act of Maryland, of November, 1791, c. 45. *Beatty's Administrators v. Burnes's Administrators*, 8 C. 98....iii. 41.

6. A debt due to a British subject not being barred by a statute of limitations at the commencement of the war in 1775, the treaty of peace of 1783 does not allow the time previous to the war to be added to any time subsequent to the treaty in order to make a bar. *Hopkirk v. Bell*, 3 C. 454....i. 640.

7. Article 3505, of the Code of Louisiana, does not apply to, or limit suits on paper not negotiable. *Hill v. Tucker*, 18 H. 458....xix. 587.

8. The preceding decision, *Hill v. Tucker*, 18 H. 458, applied to this case. *Goodall v. Tucker*, 18 H. 469....xix. 594.

#### CORPORATIONS, D. 1; PARTNERSHIP, B. 8.

#### 2. EXCEPTIONS AND DISABILITIES.

1. The exception of merchants' accounts, in the statute of limitations of Virginia, applies to actions of assumpsit as well as account. *Mandeville v. Wilson*, 5 C. 15....ii. 178.

2. An account closed by the cessation of dealings is not an account stated. *Ib.*

3. It is not necessary that any item should come within the five years. *Ib.*

4. The exception in the Maryland statute of limitations, in favor of "such accounts as concerns the trade or merchandise between merchant and merchant, their factors and servants, which are not residents within this province," applies to dealings between a merchant creditor residing out of Maryland, and a debtor residing in Maryland. *Bond v. Jay*, 7 C. 350....ii. 565.

5. And in order to take the case out of the exception, it is not sufficient to aver that the creditor returned to, came, and was within the State of Maryland, after the cause of action accrued, and more than three years before bringing the suit. It is necessary to aver that the plaintiff became a resident in Maryland more than three years before the suit was brought. *Ib.*

6. A removal from the county which does not in fact obstruct an action, is

not within the exception contained in the 14th section of the act of limitations of Virginia. *Wilson v. Koontz*, 7 C. 202....ii. 512.

7. Under the act of Virginia, (Rev. Code, 169, c. 92, § 56,) allowing three years to bring actions after the removal of disabilities, the disability is not removed by a non-resident's coming into the State, unless the defendant was then a resident, so that he could be sued. *Faw v. Roberdeau's Executor*, 3 C. 174....i. 551.

8. The 3d section of the act of congress, of March '3, 1803, (2 Stats. at Large, 237,) for the relief of insolvent debtors in the District of Columbia, does not create any express or implied exception to the operation of the statute of limitations, by making the insolvent a trustee for his creditors in respect to his future property, nor is any demand included in the schedule of his debts made thereby a debt of record. *Bowie v. Henderson*, 6 W. 514....v. 142.

9. To come within the exception of merchants' accounts, in the statute of limitations, the account must be open. *Toland v. Sprague*, 12 P. 300....xii. 729.

10. To come within the exception in the statute of limitations concerning merchants' accounts, an action on the case must be founded on an account between merchants, which concerns the trade of merchandise. *Spring v. Gray's Executors*, 6 P. 151....x. 74.

11. A contract of charter-party on half profits, though both parties are merchants, is not within this exception. *Ib.*

#### PARTNERSHIP, B. 6, 7, 8.

### 3. NEW PROMISE AND ACKNOWLEDGMENT.

1. To remove the bar of the statute of limitations by a new promise, it must be determinate and unequivocal; and if a new promise is to be raised by implication of law from an acknowledgment, there must be an unqualified acknowledgment of a subsisting debt which the party is liable and willing to pay. *Bell v. Morrison*, 1 P. 351....vii. 612.

2. A declaration by the personal representatives of the original debtor, deceased, that he had no funds to pay the debts of the testator, will not take the case out of the statute of limitations. *Thompson v. Peter*, 12 W. 565....vii. 361.

3. One partner cannot deprive the firm of the bar of the statute of limitations, after a dissolution of the partnership. *Bell v. Morrison*, 1 P. 351....vii. 612.

4. An acknowledgment of the original justice of a claim is not sufficient to take the case out of the statute of limitations; the acknowledgment must go to the fact that it is still due. *Clementson v. Williams*, 8 C. 72....iii. 30.

5. Proof that the promisor of a note, which had been discounted at the bank, was heard to say to a third person who congratulated him on being free from debt, "yes, except one d—d \$500 in the Bank of Columbia, which I can pay at any time," and that this note was the only one of his then in the bank, does not amount to a new promise, nor to enough to cause one to be

implied, and does not remove the bar of the statute of limitations. *Moore v. Bank of Columbia*, 6 P. 86....x. 38.

6. A recital in the defendant's deed, that the plaintiff and others had paid the defendant's debt, the repayment of which the defendant desired to secure to him, is evidence from which the jury may infer that the payment was at the defendant's request, and is also sufficient to take the debt out of the statute of limitations. *King v. Riddle*, 7 C. 168....ii. 500.

7. To take a promise out of the statute of limitations, the acknowledgment must be unqualified and unconditional, and show positively that the debt is due, in part or in whole. *Wetzell v. Bussard*, 11 W. 309....vi. 604.

8. But if it be conditional, it may create a new cause of action, for which the original debt forms the consideration; and, in such case, the plaintiff must prove performance of the condition. *Ib.*

### C. ACTIONS OF TORT.

#### LAWS OF THE SEVERAL STATES, B. 1.

In order to avoid the plea of the statute of limitations to an action by joint tenants, it is necessary to show that all the plaintiffs were under a disability to sue. *Marsteller v. M' Olean*, 7 C. 156....ii. 494.

### D. SEALED INSTRUMENTS AND JUDGMENTS.

1. Under the law of Virginia, a *scire facias* against the executor of the judgment debtor, and an execution by virtue thereof, do not bring the case within the exception in the statute of limitations of judgments on which executions have issued. *Deneale v. Stump's Executors*, 8 P. 526....xi. 202.

2. To come within the exception of contracts by "specialty" in the statute of limitations of Virginia, it must appear that the instrument is recognized as a specialty by the law of that State; it is not enough that it is treated as a specialty by the law of the place where it was made. *Bank of the United States v. Donnally*, 8 P. 361....xi. 127.

3. The statute of Mississippi limiting suits on judgments recovered out of that State, did not apply to judgments recovered before its passage; nor did it have reference to the interval before the trial, but before action brought. *Murray v. Gibson*, 15 H. 421....xx. 583.

4. Where a saving clause in a statute of limitations was repealed, it was held that the statute began to run only from the time of the repeal. *Lewis v. Lewis*, 7 H. 776....xvii. 400.

### E. CRIMES AND PENALTIES.

A *qui tam* action founded on the act of the 22d of March, 1794, (1 Stats. at Large, 347,) prohibiting the slave-trade, is barred by the lapse of more than two years under the 32d section of the act of the 30th of April, 1790, (1 Stats. at Large, 119,) limiting prosecutions under penal statutes. *Adams v. Woods*, 2 C. 336....i. 492.

## F. EQUITABLE TITLES, AND HEREIN OF TRUSTS.

1. Twenty years' adverse possession, by the holder of a legal title, bars an equitable title. *Peyton v. Stith*, 5 P. 485....ix. 436.

1a. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, no length of time ought to exclude relief. *Prevost v. Gratz*, 6 W. 481....v. 131.

2. But as length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of the original transactions, it operates, by way of presumption, in favor of innocence and against imputation of fraud. *Ib.*

3. The lapse of forty years, and the death of all the original parties, deemed sufficient to warrant a presumption of the discharge and extinguishment of a trust proved to have existed by strong circumstances; by analogy to the rule of law, which after a lapse of time presumes the payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances may reasonably justify it. *Ib.*

4. The allegations in the bill and the denials in the answer examined, to determine whether the statute of limitations was a bar. *Harpending v. Dutch Church*, 16 P. 455....xiv. 378.

5. Courts of equity follow the limitation of twenty years prescribed by the law as a limitation of actions of ejectment, and ordinarily hold an equitable right to land to be barred by an adverse possession for that length of time. *Elmendorf v. Taylor*, 10 W. 152....vi. 860.

6. One who is not actually a trustee, but upon whom a court of equity forces that character only for the purpose of a remedy, may avail himself of this bar. *Ib.*

7. If one enter on vacant land, not claiming title, and cultivate part of the tract, and afterwards attorn to the holder of a legal title to the whole tract under a patent, the actual possession of the former becomes the actual possession of the latter, of the entire tract described in the patent, from the moment of entry; and after the lapse of twenty years therefrom, bars an equitable title as to the whole tract. *Peyton v. Stith*, 5 P. 485....ix. 436.

8. Under the law of Kentucky, twenty years' adverse possession is a legal bar; and being so, it bars an equitable title. *Lewis v. Marshall*, 5 P. 470....ix. 429.

9. A possession, which will bar an ejectment, will bar an equitable title *Hunt v. Wickliffe*, 2 P. 201....viii. 85.

10. Within what time a constructive trust will be barred, must depend on the circumstances of each case. *Michoud v. Girod*, 4 H. 503....xvi. 188.

11. The statute of limitations does not begin to run in favor of a trustee who has received money for his *cestui que trust*, until a demand and refusal. *Taylor v. Benham*, 5 H. 233....xvi. 377.

12. Mere lapse of time constitutes no bar to a bill to enforce a subsisting trust; and time begins to run against a trust only from the date of its open disavowal. *Oliver v. Piatt*, 3 H. 833....xv. 479.

13. Even unjustifiable delay and gross inattention on the part of some of



the *cestuis que trust*, furnishes no bar to relief against persons conversant with the trust. *Ib.*

EQUITY, B. h. 6.

## G. REMEDIES IN EQUITY, AND HEREIN OF STALE CLAIMS.

EQUITY, B. b. 4.

1. Where parties set up a claim under a voluntary post-nuptial settlement, after the lapse of upwards of forty years, and great change of value of the property partly attributable to the expenditure of the respondents and those under whom they claim, and no fraud was charged. *Held*, that the claim was stale, and a court of equity would not lend its aid to enforce it. *Wagner v. Baird*, 7 H. 234....xvii. 105.

2. Though the statute of limitations be not pleaded, thirty years adverse possession, and acquiescence therein by the plaintiff and those under whom he claims, afford a complete bar in equity. *Piatt v. Vattier*, 9 P. 405....xi. 404.

3. Though an express trust does not begin to be barred by lapse of time, until a disavowal of it, yet a constructive trust, forced on a party as a remedy for a fraud, is in general barred by a lapse of twenty years after possession taken. *Boone v. Chiles*, 10 P. 177....xii. 63.

4. Persons under no disability, who slept upon their rights under a marriage settlement for a period more than thirty years, cannot have the aid of a court of equity to assist them, especially against executors who have acted in good faith. *DeLane v. Moore*, 14 H. 258....xx. 163.

5. Lapse of time, and the death of the parties to a deed impeached as fraudulent, are entitled to great, and in some cases, controlling weight, in a court of equity. *Jenkins v. Pye*, 12 P. 241....xii. 712.

6. In equity, as well as at law, a statute of limitations is a bar, where the conflicting titles are adverse in their origin, and one was equitable and the other legal. *Miller v. McIntyre*, 6 P. 61....x. 24.

7. If new parties are made by amending a bill in equity, the statute of limitations does not cease to run in their favor until they are thus made parties. *Ib.*

8. If an amended bill sets up a new title, the statute of limitations runs against that title, till the filing of the amended bill. *Holmes v. Trout*, 7 P. 171....x. 442.

9. The act of North Carolina of 1715 concerning wills, &c., in force in Tennessee, does not bar, after the lapse of seven years from the death of a debtor, a bill in equity against his heirs, to obtain a legal title to land which he contracted to convey. Lapse of time held not to have rendered the claim stale, due diligence having been used. *Coulson v. Walton*, 9 P. 62....xi. 282.

10. A deed of trust to sell to pay a note, if suit be brought on it, may be executed though the note is turned into a judgment, and more than six years have elapsed. *Bank of the Metropolis v. Guttschlick*, 4 P. 19....xiii. 322.

11. *Ex parte* settlements of accounts in the orphans' court in Alexandria, are *prima facie* correct, and a bill brought to open them, after the lapse of twelve years, no excuse for the delay being averred therein, was dismissed by reason of laches. *Lupton v. Janney*, 13 P. 381 ...xiii 213.



12. An equitable bar arises from lapse of time, in cases not strictly within any statute of limitations, but within the rule which requires reasonable diligence to entitle a party to relief. *Bowman v. Wathen*, 1 H. 189 . . . .xiv. 560.

13. Where the owner of a right to a ferry had acquiesced for thirty-eight years in the possession, enjoyment, and improvement of a ferry at that place, by others, equity will not interfere, the lapse of time affording an equitable bar, even if the complainants, and those under whom they claimed, had not actual notice of the existence of the defendants' ferry, on account of their residence in another State. *Ib.*

14. An unexecuted trust for the payment of debts, having been decreed to be subsisting in 1836, and a bill to enforce that trust having been filed soon after that decree, the lapse of time since the testator's death is not a bar. *Bank of the United States v. Beverly*, 1 H. 134 . . . .xiv. 533.

15. Where a trust was created in favor of creditors under which one of them had a right to require a sale of the property and payment of his debt in April, 1818, and neither he nor the trustee took any step until August, 1837, and the delay was wholly unaccounted for, though no statute bar existed, it was held that the claim to have the trust executed was stale, and equity would not interfere. *McKnight v. Taylor*, 1 H. 161 . . . .xiv. 546.

ACCOUNT, B. 1, 2; BILLS OF REVIEW, 1, 2; EQUITY, B. g. 3; EXECUTORS, &c. A. 18.

## H. GENERALLY, AND HEREIN OF PLEADING THE STATUTE

### PRACTICE, I. B. 3.

1. The statute of limitations of New York, having made twenty years' adverse possession of land a bar, a plea of forty years' adverse possession is good, and it is not necessary to make express reference in the plea to the statute relied on. *Harpending v. Dutch Church*, 16 P. 455 . . . .xiv. 378.

2. The court cannot ingraft, on a statute of limitations, an exception not found therein, however reasonable and just it may be. *Bank of the State of Alabama v. Dalton*, 9 H. 522 . . . .xviii. 249.

3. It is not competent for the court to ingraft exceptions upon the statute of limitations, upon the ground that they are within the same equity as those provided for by the legislature. *M'Iver v. Ragan*, 2 W. 25 . . . .iv. 10.

4. The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away. *Clementson v. Williams*, 8 C. 72 . . . .iii. 30.

## LIS PENDENS.

### VENDOR AND PURCHASER, C

A suit is not so pending as to operate as constructive notice, until the process has been served or publication made. *Games v. Stiles*, 14 P. 322 . . . .xiii. 479.

### EJECTMENT, D. 3.

## LOCAL LAW.

CONFLICT OF LAWS; LAWS OF THE SEVERAL STATES.

### LOTTERY.

The legality of the drawing of a lottery is not affected by irregularities which did not vary the chances of the party complaining. *Brent v. Davis*, 10 W. 395. . .vi. 449.

ASSIGNMENT OF CHOSSES IN ACTION, A. 2.

### MAINTENANCE.

The English statute of maintenance, adopted in Kentucky, though it declared the contract void for maintenance between the parties, did not authorize a dismissal of a suit between other parties, though in furtherance of the contract. *Boone v. Chiles*, 10 P. 177 . . . .xii. 63.

### MANDAMUS.

A. WHEN IT IS OR NOT THE PROPER REMEDY, 333.

B. JURISDICTION TO ISSUE THE WRIT, 335.

C. PRACTICE, 336.

A. WHEN IT IS OR NOT THE PROPER REMEDY. (ERROR, F.)

1. When a judge has acted in his judicial capacity in refusing to issue a warrant because he deemed the evidence insufficient, a *mandamus* cannot be granted to compel him to issue it. *United States v. Lawrence*, 3 D. 42 . . . .i. 83.

2. This court has no power to compel a judge to decide according to the dictates of any judgment but his own. *Ib.*

3. Motion for *mandamus* to circuit court for Pennsylvania, to proceed under pension act. *Hayburn's Case*, 2 D. 409 . . . .i. 8.

4. Where a writ of error was brought to reverse the order of the district court for the territory of Orleans, staying the proceedings in a suit brought by the plaintiff against the defendant, marshal of the territory, upon a suggestion of the attorney for the United States, who was not party to the proceeding; after argument the plaintiff's counsel dismissed the writ of error, and moved for a *mandamus, nisi*, to the district judge, in the nature of a *procedendo*. which was granted. *Livingston v. Dorgenois*, 7 C. 577 . . . .ii. 677.

4a. A *mandamus* cannot be used to control the discretion of an inferior court as to the proceedings intermediate between the institution of a suit and its trial, and if the judge acts oppressively, this is not the tribunal to which to apply. *Bradstreet v. Huntington*, 8 P. 588 . . . . xi. 222.

5. Motion for a rule to show cause why a *mandamus* should not issue to order a judgment to be entered on a verdict, refused; it appearing that a motion for a new trial was under advisement. *Ib.*

6. A writ of *mandamus* ordering the district court to render a judgment, not according to its views of the merits, but according to the views of this court, or to compel the marshal to execute a judgment upon property, the title to which was in dispute, refused. *Life and Fire Ins. Co. v. Adams*, 9 P. 571, 573 . . . . xi. 484.

7. Though a writ of *mandamus* was refused, the court expressed an opinion on the question of law which gave occasion for the application. *Ex parte Davenport*, 6 P. 661 . . . . x. 302.

8. Where the district court of the northern district of New York, having circuit court powers, dismissed certain writs of right because the value of the land demanded was not averred in the declaration, a writ of *mandamus* was awarded, ordering the judge to reinstate all the cases and proceed to try them. *Ex parte Bradstreet*, 7 P. 634 . . . . x. 604.

9. An application to a district court, to set aside a default and inquisition, is to the discretion of that court, and its refusal is not a proper subject of a writ of *mandamus*. *Ex parte Roberts*; *Ex parte Adshead*, 6 P. 216 . . . . x. 93.

10. Rule to show cause why a *mandamus* should not issue was granted, where it was sworn that the judge had neglected or refused to enter a judgment. *Ex parte Bradstreet*, 6 P. 774 . . . . x. 373.

11. This court will not grant a *mandamus* to revise the proceedings of a circuit court as to the pleadings. This can only be done by a writ of error after a final judgment. *Bank of Columbia v. Sweeny*, 1 P. 567 . . . . vii. 701.

12. A writ of *mandamus* cannot be issued by the circuit court for the District of Columbia, to compel the secretary of the navy to perform an executive act, not merely ministerial, but involving the exercise of judgment. *Decatur v. Paulding*, 14 P. 497 . . . . xiii. 610.

13. Where the district judge, sitting in the circuit court in Louisiana, was proceeding, though irregularly, in an equity cause, a *mandamus* cannot issue; the only remedy is by an appeal after a final decree. *Ex parte Whitney*, 13 P. 404 . . . . xiii. 220.

14. The power of deciding on the sufficiency of an affidavit to hold to bail, and on the amount of bail, is part of the judicial power of the circuit court, and a *mandamus* does not lie to reëxamine such decision. *Ex parte Taylor*, 14 H. 3 . . . . xx. 3.

15. The refusal of a circuit court to fill a blank in its judgment, with the amount of costs, after the mandate of this court affirming its judgment had been received, is not ground for a *mandamus*; for it was an exercise of its judicial power. *Ex parte Many*, 14 H. 24 . . . . xx. 13.

16. Whatever may be the authority of this court to interpose by *mandamus*, in case of removal of an attorney by an inferior court, it will not be exercised

unless where the conduct of the court below has been grossly irregular or flagrantly improper. *Ex parte Burr*, 9 W. 529 . . . vi. 168.

17. This court cannot order a judge to sign a bill of exceptions which he returns, is not conformable to the truth. *Ex parte Bradstreet*, 4 P. 102 . . . ix. 20.

18. The district judge having, after argument, decided that the collector is not entitled to the custody of goods seized under the collection act of 1799, any longer than until proper proceedings have been instituted under the 89th section of that act, (1 Stats. at Large, 695,) to ascertain whether they are forfeited. On a motion for a *mandamus*, held, 1. That this was not a proper case for a *mandamus*, because the decision of the district judge could not thus be revised by this court. *Ex parte Hoyt*, 13 P. 279 . . . xiii. 156.

19. 2. That his decision was correct. *Ib.*

20. A *mandamus* will not be issued to the secretary of the treasury to compel the payment of a debt due from the United States, for which no appropriation has been made by law. *Reeside v. Walker*, 11 H. 272 . . . xviii. 623.

21. A *mandamus* should not be granted to compel the superintendent of public printing of the houses of congress, to place a document in the hands of the printer of the senate, instead of in the hands of the printer of the house of representatives. *United States v. Seaman*, 17 H. 225 . . . xxi. 470.

22. A writ of *mandamus* should not be issued to the secretary of the treasury commanding him to pay to a judge of a territory his salary for the unexpired term of the office from which he had been removed by the President, and another person appointed thereto. *United States v. Guthrie*, 17 H. 284 . . . xxi. 506.

23. To supersede the execution of a decree for the foreclosure of a mortgage, the mortgagor must give security for the whole amount decreed to be due; and where he failed to do so, and the court below refused to execute the decree, a peremptory *mandamus* was awarded. *Stafford v. Union Bank of Louisiana*, 17 H. 275 . . . xxi. 505.

24. The decision in the preceding case of *Stafford and Wife v. The Union Bank of Louisiana*, again affirmed. *Stafford v. New Orleans Canal and Banking Co.* 17 H. 283 . . . xxi. 506.

25. If a plaintiff could make out a valid title to pay, as an officer in the navy of the United States, a *mandamus* to the secretary of the navy would not lie to compel its payment. *Brashear v. Mason*, 6 H. 92 . . . xvi. 611.

ACTION, 2; PRACTICE, II. C. 1.

## B. JURISDICTION TO ISSUE THE WRIT.

1. This court has not jurisdiction to issue a writ of *mandamus* to the register of a land-office of the United States, commanding him to enter the application of a party for certain tracts of land, which *mandamus* had been refused by the supreme court of the State of Ohio, upon a submission, by the register, to the jurisdiction of that court, being the highest court of law or equity in that State. *M'Cluny v. Silliman*, 2 W. 369 . . . iv. 137.

2. A state court cannot issue a *mandamus* to an officer of the United States. *M'Clung v. Silliman*, 6 W. 598 . . . v. 184.

3. It being suggested that a State was the owner of a fund proceeded against in the district court, in admiralty, the claim of the State was examined, and this court having found that the State was not a necessary party, a peremptory *mandamus* to the district judge to proceed, to adjudicate between the individual parties, was awarded. *United States v. Peters*, 5 C. 115 . . . .ii. 206.

4. The power of the circuit courts of the United States to issue the writ of *mandamus* is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. *M'Intire v. Wood*, 7 C. 504 . . . .ii. 647.

5. This court has power to issue a writ of *mandamus* to a judge of a circuit court, commanding him to sign a bill of exceptions. *Ex parte Crane*, 5 P. 190 . . . .ix. 278.

6. The circuit court of the District of Columbia has jurisdiction to issue a writ of *mandamus* to the postmaster-general, to compel him to do a merely ministerial act, which the relator has a complete right, under an act of congress, to have done by him, and as to which he has no discretion. *Kendall v. United States*, 12 P. 524 . . . .xii. 834.

### C. PRACTICE.

1. If the district judge and the adverse party will waive a preliminary rule to show cause, and agree to proceed at once to a hearing of a motion for a *mandamus*, the court will hear the motion and grant or refuse the writ. *Life and Fire Ins. Co. of New York v. Adams*, 9 P. 571, 573 . . . .xi. 484.

2. A rule to show cause why a *mandamus* should not issue, is a call upon the judge to explain his conduct, and implies that a case has been made out which renders it proper for this court to know the reasons for his decision. It should not be granted, unless a *prima facie* case is made by the record, or by affidavit. *Postmaster-General v. Trigg*, 11 P. 173 . . . .xii. 390.

3. Upon the return of a rule to show cause why a *mandamus* should not issue, the party ruled has a right to show cause whether the person who obtained the rule moves or not. *Ex parte Bradstreet*, 4 P. 102 . . . .ix. 20.

4. A judge, upon whom such a rule is made, need not swear to the truth of the return of the reasons why he refused to sign a certain bill of exceptions. *Ib.*

5. Proceedings by *mandamus* must be brought up by writ of error, not by appeal. *Ward v. Gregory; Same v. Robinson*, 9 P. 633 . . . x. 604.

### MANDATE.

PRACTICE, I. E. 3.

### MARRIAGE.

1. An actual contract of marriage, made without the presence of a priest, before a civil magistrate of Spain, in the colony of Louisiana, while under the dominion of that power, followed by cohabitation and acknowledgment, was

valid, and the offspring legitimate, according to the laws in force in the colonies of Spain. *Hallett v. Collins*, 10 H. 174 . . . xviii. 349.

2. Whether, under the laws of Georgia or of South Carolina, a valid, legal marriage can be made by an agreement of the parties, in the presence of friends, to marry, before any sexual intercourse between them, and followed by cohabitation, the court was equally divided in opinion. *Jewell's Lessee v. Jewell*, 1 H. 219 . . . xiv. 578.

3. Bill in equity to establish the title of Myra Clark Gaines to one half the estate of the late Daniel Clark, as his legitimate daughter, and to have an account thereof from his executors and others. *Held*, that the legitimacy of the complainant was not made out, and the bill was dismissed. *Gaines v. Relf*, 12 H. 472 . . . xix. 254.

4. The marriage of the complainant's mother to D. being admitted, his confession that he had a lawful wife living at the time of such marriage, is not admissible in evidence as against third persons. *Ib.*

5. The certificate of a clergyman, made sixteen years after the alleged act, that he had married the persons named therein, held not to be evidence. *Ib.*

6. A record of a county court in New Orleans, containing no libel, or petition, and not showing upon its face that it was a proceeding *in rem*, held inadmissible in evidence as against third persons. *Ib.*

## MARSHAL.

### BOND, C.

#### A. RIGHTS AND POWERS, 337.

#### B. DUTIES AND LIABILITIES, 337.

##### A. RIGHTS AND POWERS.

1. The act of May 7, 1800, § 3, (2 Stats. at Large, 61,) does not so far repeal the 28th section of the judiciary act of 1789, (1 Stats. at Large, 87,) that a sale on a *venditioni exponas*, by a marshal, after he had been removed from office, was void. *Doolittle's Lessee v. Bryan*, 14 H. 563 . . . xx. 342.

2. Under the law of Maryland, in force in the county of Washington, in the District of Columbia, the marshal is entitled to poundage on an execution in favor of the United States; and if the latter discharge their debtor from imprisonment, they are justly liable to pay the poundage. *United States v. Ringgold*, 8 P. 150 . . . xi. 53.

EXECUTIONS, D. 1, 2; SALES, B. 3-5.

##### B. DUTIES AND LIABILITIES. (ADMIRALTY, C. a. 5.)

1. To an action on the case against a marshal for not levying an execution, a plea setting out, *in hæc verba*, a warrant from the secretary of the treasury, remitting the forfeiture, and containing a recital of every fact made necessary

by the act of congress to an exercise of that authority, is a good bar. *United States v. Morris*, 10 W. 246....vi. 395.

2. Under the acts of February 27, 1801, (2 Stats. at Large, 103,) and March 8, 1801, (2 Stats. at Large, 115,) concerning the District of Columbia, the marshal is not required to apply to the district attorney for executions for fines and costs, and he is not liable for omitting to do so. *Levy Court of Washington County v. Ringgold*, 5 P. 451....ix. 418.

3. The marshal having expended, in repairing the jail, under the sanction of the treasury department, certain moneys to which the levy court was entitled, he is not liable for interest thereon. *Ib.*

4. The levy court of the county of Washington is not entitled to one half of the fines, penalties, and forfeitures, imposed by the circuit court, in cases at common law. *Ib.*

5. The comptroller of the treasury has a right to direct the marshal to whom he shall pay money received upon execution, and a payment according to such directions is good ; and it seems he may avail himself of it upon the trial, without having submitted it as a claim to the accounting officers of the treasury. *United States v. Giles*, 9 C. 212....iii. 839.

6. If an execution creditor authorize a deputy marshal to receive in payment of the execution, other currency than gold or silver, he does not act as the deputy of the marshal in receiving such satisfaction, but as the agent of the creditor, and the marshal is not responsible for his failure to pay over what he received. *Gwinn v. Buchanan*, 4 H. 1....xvi. 1.

7. Though a marshal be out of office, he must complete a levy which he has begun, and is subject to all legal remedies in favor of the execution creditor. *McFarland v. Gwin*, 8 H. 717....xv. 614.

8. If a marshal receive bank-notes in satisfaction of an execution, he is liable to the creditor for the amount in gold or silver. *Gwin v. Breedlove*, 2 H. 29....xv. 16.

9. The dockets and records of a court, which show, in the modes in that court usual, the receipt of moneys by the marshal, are evidence against his sureties. *Williams v. United States*, 1 H. 290....xiv. 614.

10. The marshal is bound to serve process as soon as he reasonably can. *Kennedy v. Brent*, 6 C. 187....ii. 361.

## MARSHALLING ASSETS.

### EXECUTORS, &c. B.; WILL, D. 2.

Under the laws of Georgia, a judgment in another State does not rank with domestic judgments in marshalling the assets and debts of a deceased person. *M'Elmoyle v. Cohen*, 18 P. 312....xiii. 169.



## MARTIAL LAW.

The government of a State, by its legislature, has the power to protect itself from destruction by armed rebellion, by declaring martial law ; and the legislature is the sole judge of the existence of the necessary exigency. *Luther v. Borden*, 7 H. 1 . . . . xvii. 1.

## MASTER.

EQUITY, C. 9 ; SHIPPING, E.

## MASTER AND SERVANT.

1. One who, being lawfully on the defendants' railroad, was injured by the gross negligence of one of their servants, is entitled to an action for his damages, though he was a stockholder in the corporation, was riding by invitation of the president, paying no fare, and not in the usual passenger cars. *Philadelphia and Reading Railroad Company v. Derby*, 14 H. 468 . . . . xx. 291.

2. If a servant of a railroad corporation, in the course of his employment, disobeys an express order of his employers, and thereby produces a collision, his employers are responsible to a person injured. *Ib.*

## MELIORATIONS.

1. If an occupation law be valid, it cannot enable a court of the United States, in an action of ejectment, to appoint commissioners to value the improvements. Their value at law must be tried by a jury. But there is a complete remedy in equity. *Bank of Hamilton v. Dudley's Lessee*, 2 P. 492 . . . . viii. 192.

2. The life-estates of the tenants in possession under a marriage settlement having been confiscated and sold, but the estates of the remainder-men, who were British subjects, not having been divested, the purchasers under the State are precluded, by the treaty of peace of 1783, (8 Stats. at Large, 80,) from making a claim for improvements under a state law. *Carver v. Jackson*, 4 P. 1 . . . . ix. 1.

SALES, A. 18.

## MERGER.

ADMIRALTY, A. 2 ; CONTRACT, H.

## MESNE PROFITS.

Trespass for mesne profits will lie against one who was in fact the landlord, in possession by his tenants, and who actually defended the ejectment, though he did not appear on the record as defendant, and another person was admitted to defend as landlord with the consent of the plaintiff. *Chirac v. Reinicker*, 11 W. 280 . . . .vi. 595.

## MILITIA.

## CONSTITUTIONAL LAW, C. 2.

1. Disobedience of an order of the President calling forth the militia, renders a citizen liable to trial by a court-martial. *Martin v. Mott*, 12 W. 19 . . . .vii. 10.

2. Such a court-martial is not required to be organized according to the rules and articles of war, under the acts of congress, nor did its authority expire with the war. *Ib.*

## MINISTERIAL AND JUDICIAL.

## CONSTITUTIONAL LAW, D.; PUBLIC LANDS OF THE UNITED STATES, IV. B. 8.

## MISNOMER.

1. Misnomer of one of the plaintiffs cannot be alleged after judgment. *Breedlove v. Nicolet*, 7 P. 413 . . . .x. 527.

2. The law knows but one Christian name, and the omission or insertion of a middle name, or its initial letter, is not material. *Games v. Stiles*, 14 P. 322 . . . .xiii. 479.

## MISTAKE.

1. Where a party having a claim on a foreign government, in ignorance that it had been allowed, entered into a contract to pay an agent a large percentage, in consideration that he would bring the claim to a favorable issue, the agreement was ordered to be cancelled on the ground of mistake. *Allen v. Hammond*, 11 P. 63 . . . .xii. 338.

2. A material misrepresentation by a vendor, though made by mistake, must be made good; if it is not in his power to do it specifically, then by way of damages. *M'Ferran v. Taylor*, 3 C. 270 . . . .i. 577.

3. A mistake or the ignorance of law, forms no ground of relief from contracts fairly entered into, with full knowledge of the facts, under circumstances

raising no presumption of fraud, imposition, or undue advantage taken. *Bank of the United States v. Daniel*, 12 P. 32....xii. 618.

4. A voluntary payment made to a collector under a mistake of law, cannot be recovered back. *Elliott v. Swartwout*, 10 P. 137....xii. 46.

5. Where parties deliberately agree not to secure a debt by mortgage, but to give and receive a power of attorney authorizing the creditor to sell certain property of the debtor, and apply its proceeds to the payment of the debt, and the power is annulled by the death of the debtor, a court of equity will not direct a new security to be given, or fix a lien on the property as security for the debt, though satisfied that the parties acted in ignorance of that rule of law which makes the death of the constituent a revocation of the power. *Hunt v. Rousmaniere's Administrators*, 1 P. 1....vii. 419.

6. It being admitted by the demurrer to a bill in equity that certain powers of attorney were given and received under the belief that they were, and with the intention that they should create, a specific lien and security upon certain vessels, and the donor of the powers having died, and the creditor having brought his bill to have the agreement for security executed, the demurrer was overruled, and the defendant ordered to answer. *Hunt v. Rousmaniere's Administrators*, 8 W. 174....v. 379.

7. If a bond, executed in performance of articles, depart therefrom by mistake, equity will relieve, but such departure must be clearly shown. *Finley v. Lynn*, 6 C. 238....ii. 386.

8. An agreement in a court of common law, chancery or prize, made under a clear mistake, will be set aside. *The Hiram*, 1 W. 440....iii. 627.

9. A having purchased land from B, suffered it to be sold for taxes; afterwards C, who was A's surety for the price, obtained from B a new bond to convey, the first being surrendered; B was ignorant of the tax sale, received no new consideration, and intended merely to substitute C for A. On a bill by C to have the contract rescinded, and the judgment against him for the purchase money enjoined; *Held*, 1. That the loss of the title was C's loss. 2. That the bond to C should be reformed, so as to accord with the real agreement. 3. That this might be done under the answer without a cross-bill; and a decree was made accordingly. *Bradford v. Union Bank of Tennessee*, 13 H. 57....xix. 383.

INSURANCE, B. 1; SPECIFIC PERFORMANCE, A. 7, 35, 37; VENDOR AND PURCHASER, A. 6.

## MONEY.

1. Perpetual ground-rent, reserved in a deed made in 1779, payable in the current money of Virginia, is not to be reduced by the scale of depreciation under the act of assembly of 1781, c. 22, but the actual annual value in 1779 is to be paid in specie or its equivalent. *Naw v. Marsteller*, 2 C. 10....i. 428.

2. A general deposit of bills of the bank receiving it, must be repaid by the nominal amount of those bills, though they were current at only half their

nominal amount, at the time of their deposit. *Bank of the Commonwealth of Kentucky v. Wister*, 2 P. 818....viii. 123.

PAYMENT, A, 7 ; PLEADING, G. 1.

## MORTGAGE.

A. ITS NATURE, AND HEREIN OF CONDITIONAL SALES AND DEEDS ABSOLUTE IN FORM, 342.

B. OF EQUITABLE MORTGAGES, 343.

C. REDEMPTION, AND WHEN BARRED, 343.

D. FORECLOSURE, AND WHEN BARRED, 343.

E. OTHER RIGHTS OF MORTGAGOR AND MORTGAGEE, 344.

A. ITS NATURE, AND HEREIN OF CONDITIONAL SALES AND DEEDS ABSOLUTE IN FORM.

1. Parties may make a conditional sale, but the leaning of courts of equity is against such sales. *Conway's Executors v. Alexander*, 7 C. 218....ii. 516.

2. The true inquiry is, whether the instrument was intended as a sale, or as security for a debt, and the extrinsic evidence, as well as the terms of the deed, must be examined to determine this question. *Ib.*

3. The absence of a covenant to repay is not decisive. *Ib.*

4. The fact that the sum paid, bore no proportion to the real value of the land, is entitled to great weight, upon the question whether a conditional sale was intended. *Ib.*

5. If a deed, absolute in its form, was intended as a security for a loan of money, equity treats an attempt to convert it into a sale of the property as a fraud, against which it relieves by decreeing a redemption. *Morris v. Nixon's Executors*, 1 H. 118....xiv. 522.

6. Where the original proposition was for a loan on the security of the property, and a bond was given for the sum advanced, though the deed was absolute, the grantee must show that the original design of a loan on security was changed, and a sale substituted therefor. *Ib.*

7. Circumstances which convinced the court that a loan on security was intended. *Ib.*

8. The real object of a deed of lands being to give security for a debt, a court of equity will decree a foreclosure, though the deed be so drawn as to be absolute at law. *Hughes v. Edwards*, 9 W. 489....vi. 146.

9. On a bill to redeem, parol evidence is admissible to show that what appears upon the written papers to have been a conditional sale for an agreed price, was in fact a loan of money, and that the land was but a security for the money lent. *Russell v. Southard*, 12 H. 189....xix. 66.

10. The inadequacy of the sum mentioned in the papers as the consideration of the alleged sale, is an important circumstance to show that the transac-

tion was not in truth a sale, but a mortgage; and, in a doubtful case, courts will incline to consider it a mortgage. *Ib.*

11. Though no personal security for the repayment of the money was given in writing, yet where the written memorandum ascertains the amount advanced, and the oral evidence shows it was by way of loan, the relation of debtor and creditor exists and assumpsit will lie, and the conveyance is a mortgage. *Ib.*

12. An absolute conveyance may be shown to be a mortgage, upon the ground that it is a fraud by the mortgagee to set it up as absolute. *Sprigg v. Bank of Mount Pleasant*, 14 P. 201 . . . . xiii. 422.

13. Equity does not treat a mortgage as a mere lien, but considers the mortgagee a trustee for the mortgagor. *Conard v. Atlantic Ins. Co. of New York*, 1 P. 386 . . . . vii. 637.

## B. OF EQUITABLE MORTGAGES.

1. To constitute an equitable mortgage, not only a deposit of title papers, but an intent to give security thereby, must be shown. *Mandeville v. Welch*, 5 W. 227 . . . . iv. 626.

2. Explanation of the former decree of this court in the same case, 9 C. 500. *Campbell v. Pratt*, 5 W. 429 . . . . iv. 692.

## C. REDEMPTION, AND WHEN BARRED.

1. Though a mortgagee in possession may take a release from the mortgagor, the transaction is to be carefully scrutinized, and if any unconscientious advantage was taken, the release will be set aside. *Russell v. Southard*, 12 H. 139 . . . . xix. 66.

2. Twenty years possession under a *de facto* foreclosure of a mortgage, is a bar to redemption, even though the proceedings to foreclose were not regular, unless the mortgagor accounts for the delay, and shows that he has a valid right to redeem. *Slicer v. Bank of Pittsburg*, 16 H. 571 . . . . xxi. 301.

3. Lapse of time will give rise to a presumption that a mortgagor in possession has paid the mortgage debt; but such presumption is repelled by payments on account of the debt within eight and thirteen years, by the mortgagor; and purchasers under him, with constructive notice of the mortgage, are affected by his act of payment. *Hughes v. Edwards*, 9 W. 489 . . . . vi. 146.

## D. FORECLOSURE, AND WHEN BARRED.

1. To a suit to foreclose a mortgage by a sale, a prior incumbrancer should be made a party; but if not joined, and the decree for a sale has been executed before the existence of the prior incumbrance became known to the court, it is not erroneous to refuse to vacate the decree. The prior incumbrance is not affected by such a sale. *Finley v. Bank of the United States*, 11 W. 304 . . . . vi. 602.

2. A bill to foreclose an equitable mortgage on machinery, cannot be main-

tained by an assignee, who took the assignment only to secure a debt which has been paid. *Wilbur v. Almy*, 12 H. 180....xix. 89.

CONTRACT, F. 20 ; ESTOPPEL, A. 5.

#### E. OTHER RIGHTS OF MORTGAGOR AND MORTGAGEE.

1. The Texas statute of limitations of actions upon contracts, or for the detention of personal property, have no application to a bill in equity to foreclose a mortgage ; equity does not allow the mortgagor to set up his possession as adverse to the mortgagee. *Union Bank of Louisiana v. Stafford*, 12 H. 327....xix. 160. *New Orleans Canal and Banking Company v. Stafford*, 12 H. 343....xix. 168.

2. An account of rents and profits is not an inseparable incident to the redemption of a mortgage of lands ; laches by the mortgagor may, and in this case did, operate as a waiver of the right. *Russell v. Southard*, 12 H. 139....xix. 66.

3. A mortgagee in possession, who obtains insurance, and pays the premium, is not accountable to the mortgagor for what was received under the policy. *Id.*

4. A mortgagee, in possession of slaves, is accountable, not only for their hire actually received by him, but for what he might have received without gross negligence. *Bennett v. Butterworth*, 12 H. 367....xix. 186.

5. A mortgagee has no claim to the benefit of a policy of insurance underwritten for the mortgagor. *Columbia Ins. Co. v. Lawrence*, 10 P. 507....xii. 216.

INSURANCE, II. 2-6.

#### MUTUAL INSURANCE.

1. The obligation of the insured to contribute, does not cease in consequence of his forfeiture of his own insurance by his own neglect. All the members of the company are bound by the act of the majority. No member can divest himself of his obligations as such, but according to the rules of the society. *Korn v. Mutual Assurance Society*, 6 C. 192....ii. 364.

2. The additional premium upon a revaluation under the rules of the society, is only upon the excess. *Atkinson v. Mutual Assurance Society*, 6 C. 202....ii. 370.

3. An amendment of the charter of a Mutual Insurance Company, made by the legislature, at the request of the company, empowering them to divide their risks into two classes, and to value each risk anew, is valid, and a by-law to carry this into effect is in conformity with the nature of the institution, and binding on members, who, subsequent to the amendatory act, assented generally to the constitution and laws of the company. *Mutual Assurance Society v. Korn*. 7 C. 396....ii. 589.

4. Under the 6th and 8th sections of the act of assembly of Virginia, of the 22d of December, 1794, property pledged to the Mutual Assurance Society, &c., continues liable for assessments, on account of the losses insured against, in the

hands of a *bonâ fide* purchaser without notice. *Mutual Assurance Society v. Watt's Executor*, 1 W. 279....iii. 549.

5. A mere change of sovereignty produces no change in the state of rights existing in the soil; and the cession of the District of Columbia to the national government did not affect the lien, created by the above act, on real property situate in the town of Alexandria, though the personal character or liability of a member of the society could not be thereby forced on a purchaser of such property. *Ib.*

6. Under the laws in relation to the Mutual Assurance Society of Virginia, property offered for insurance, on which the premium has not been paid, and which is sold without notice, is not liable for the premium in the hands of the vendee. *Mutual Assurance Society v. Faxon*, 6 W. 606....v. 188.

## NAME.

### MISNOMER.

## NATURALIZATION.

1. The power of naturalization is exclusively in congress. *Chirac v. Chirac's Lessee*, 2 W. 259....iv. 97.

2. Under the naturalization act of January 29, 1795, (1 Stats. at Large, 414,) the administration of the oath of allegiance amounts to a judgment of the court for the admission of the applicant to the rights of a citizen, and implies that all prerequisites had been complied with. *Campbell v. Gordon*, 6 C. 176....ii. 357.

3. Under the act of April 14, 1802, (2 Stats. at Large, 158,) a minor child of a father so naturalized, became a citizen, though not then within the United States, provided she was resident therein at the time of the passage of the act. *Ib.*

4. The judgment of a court of competent jurisdiction admitting an alien to be a citizen, need not find the facts requisite by law to entitle the applicant to be so admitted. *Stark v. Chesapeake Ins. Co.* 7 C. 420....ii. 602.

5. The naturalization act of April 14, 1802, (2 Stats. at Large, 158,) did not require the time of arrival in the United States to be proved by the certificate of the report of the alien to a court; other evidence thereof was admissible, and the decree of naturalization was not required to notice the certificate. *Spratt v. Spratt*, 4 P. 398....ix. 111.

6. That decree, being in due form, is conclusive evidence of the legal naturalization of the party. *Ib.*

7. The act of March 22, 1816, (3 Stats. at Large, 258,) which requires the certificate to be recited in the decree, is not an explanation, but alteration, of the law of 1802. *Ib.*



## NAVIGABLE WATERS.

ADMIRALTY; CRIMINAL LAW, A.; HIGH SEAS; LAW OF NATIONS, B.; REVENUE LAWS, F. 2; SEA.

1. The grant from Charles the Second to the Duke of York, of the territory which now forms the State of New Jersey, passed to the duke the soil under the navigable waters as one of the royalties incident to the powers of government, which were also granted, to be held by him in the same manner and for the same purposes as this soil had been previously held by the crown; and the same is true of the grantees under the duke. *Martin v. Waddell's Lessee*, 16 P. 367 . . . .xiv. 345; *Den v. Jersey Co.* 15 H. 426 . . . .xx. 587.

2. When these grantees surrendered to the crown all the powers of government, the title to this soil passed to the crown, and at the Revolution became vested in the State of New Jersey. *Ib. Ib.*

8. The construction of these instruments of grant and surrender from and to the crown of England is not a question of local law, as to which the decision of the state court is binding on this court. *Ib.*

## NAVY OF THE UNITED STATES.

1. In an action by a marine against his commanding officer, for inflicting punishment on him for refusing to do duty in a foreign port, upon the ground that the time of his enlistment had expired and he was entitled to his discharge, *Held*, 1. That the right to determine the question whether the plaintiff was then and there entitled to his discharge, was for the time being, in the commander; and it was the duty of the plaintiff to submit to that determination and look for redress on his return home; and for any mere error in judgment in this matter, no action would lie against the commander. *Dinsman v. Wilkes*, 12 H. 890 . . . .xix. 201.

2. 2. That the refusal of the plaintiff to submit to the decision of the commander, was an act of insubordination, for which he was liable to punishment. *Ib.*

8. 3. That if the defendant, in the honest exercise of his judgment, believed it proper to confine the plaintiff on shore, he had a right to do so. *Ib.*

4. 4. If the punishment inflicted on the plaintiff, was, in any degree, or in any manner, aggravated by malice, or a vindictive feeling, or a desire to oppress him, on the part of the defendant, he is liable to an action. *Ib.*

5. A brevet field-officer of the marine corps is upon the same footing, in respect to what constitutes his title to pay and emoluments, as a brevet field-officer of infantry of the same grade. *United States v. Freeman*, 3 H. 556 . . . .xv. 548.

6. The provision of the 1st section of the act of April 16, 1818, (3 Stats. at Large, 427,) respecting brevet pay and rations, is not repealed by the act of June 30, 1834, (4 Stats. at Large, 712.) *Ib.*

7. The 5th section of the act of June 30, 1834, (4 Stats. at Large, 713.)

does repeal the joint resolution of the two houses of congress, of May 25, 1882, respecting the pay and emoluments of the marine corps. *Ib.*

8. Under what circumstances a marine officer is entitled to double rations. *Ib.*

9. The stipulation contained in the joint resolution of congress of March 1, 1845, (5 Stats. at Large, 797,) concerning the admission of Texas into the Union, which speaks of a cession of the "navy" of Texas to the United States, referred exclusively to ships and their equipment, stores, armament, and other material, and not to their officers, who were not designed to be made officers of the navy of the United States. *Brashear v. Mason*, 6 H. 92....xvi. 611.

10. The act of March 2, 1837, (5 Stats. at Large, 153,) under the terms "any person enlisted for the navy," includes marines. *Wilkes v. Dinsman*, 7 H. 89....xvii. 55.

11. The commander of a public armed vessel of the United States, who causes such punishment as he has lawful power to inflict, to be inflicted on one of his crew, is *prima facie* justified by showing it to be a case within that delegated power; but if it be proved that he was actuated by malice or passion, and not by a desire to do his duty, he is not justified. *Ib.*

12. A purser in the navy cannot charge commissions for drawing bills of exchange to procure abroad the funds which he disburses; nor can he be allowed extra compensation for paying the mechanics and laborers at a navy yard, this being an official duty. *United States v. Buchanan*, 8 H. 88.... xviii. 509.

## NE VARIETUR.

BILLS, &c. A.

## NEUTRALS.

ADMIRALTY, A. 2; CAPTURE, G.

## NEUTRALITY LAWS.

CAPTURE, E.; LAW OF NATIONS, B.

1. Under the 3d section of the act of April 20, 1818, (3 Stats. at Large, 448,) it is not necessary that the vessel should be armed, or in a condition to commit hostilities, on leaving the United States, in order to convict one indicted for being concerned in fitting out a vessel with intent that she should be employed, &c. It is sufficient if the defendant was knowingly concerned in fitting out or arming the vessel, with intent, &c., though that intent should appear to have been defeated after the vessel sailed. *United States v. Quincy*, 6 P. 445....x. 189.

2. But if the defendant had no fixed intention when the vessel sailed to employ her as a privateer, but only a wish so to employ her if he could obtain funds, on her arrival at a foreign port, for the purpose of arming her, then he is not guilty. *Ib.*

3. The 7th section of the neutrality act, of 1794, (1 Stats. at Large, 384,) does not authorize the President to employ civil officers to make seizures. *Gelston v. Hoyt*, 3 W. 246....iv. 211.

4. The act of the 5th of June, 1794, is not expressly repealed by the act of the 3d of March, 1817, (3 Stats. at Large, 370;) the act of 1794, so far as it was not changed by the act of 1817, remained in full force until the act of the 20th of April, 1818, by which all the provisions respecting our neutral relations were embraced, and all former laws on the same subject were repealed. *The Estrella*, 4 W. 298....iv. 406.

5. It is not a violation of the neutrality laws of the United States to sell to a foreigner a vessel built in this country, though suited to be a privateer and having some equipments calculated for war, but frequently used by merchant ships. *Moodie v. The Alfred*, 3 D. 807....i. 234.

## NEW TRIAL.

### ERROR, I.; EXCEPTIONS, A. C.

1. On a motion for a new trial, if, upon the whole case, justice has been done, and the verdict is substantially right, no new trial is granted, though some mistakes may have been made. *M' Lanahan v. Universal Ins. Co.* 1 P. 170....vii. 518.

2. *Aliter* on a writ of error, for then the judgment must be reversed if any erroneous ruling appears by the record to have entered into it. *Ib.*

ERROR, F. 17.

## NOLLE PROSEQUI.

PRACTICE, II. H.

## NONSUIT.

PRACTICE, II. G. 2.

## NON-USER.

DEDICATION.

## NOTARY.

BILLS, &amp;c. D. E. F.

If a justice of peace be empowered, by statute, to act as a notary, he is one *quoad hoc*. *Burke v. McKay*, 2 H. 66 . . . xv. 35.

## NOTICE.

VENDOR AND PURCHASER, C.; DEED, D. 15.

## NOVATION.

If a novation be conditional, the original debt is not extinguished until it becomes absolute by performance of the condition. *Hyde v. Booraem*, 16 P. 169 . . . xiv. 282.

EXECUTIONS, D. 9.

## NUISANCE.

RIVER.

1. Where a bill is filed by a private person asking relief by way of prevention, in a case of public nuisance, the plaintiff must aver and prove some special injury to himself; and as the corporation of Georgetown do not appear, by the bill, to have any property, or rights, which will be specially injured by an obstruction of the Potomac River, the suit cannot be sustained. *Georgetown v. Alexandria Canal Company*, 12 P. 91 . . . xii. 648.

2. To maintain a bill for an injunction to restrain a public nuisance, a private person must prove special damage to himself, and that the injury inflicted is of such a character that an action at law does not afford an adequate remedy. *Irwin v. Dixon*, 9 H. 10 . . . xviii. 6.

CONSTITUTIONAL LAW, J. 15–17.

## NUNC PRO TUNC.

PRACTICE, I. E. 1.

## OFFICE.

CLERKS OF COURTS, 2, 3.

## OFFICER.

ARMY OF THE UNITED STATES; BOND, C.; CONSTITUTIONAL LAW, C. 4; EVIDENCE, B. 3; MARSHAL; NAVY OF THE UNITED STATES; RECEIVERS AND DISBURSERS OF PUBLIC MONEY.

1. A military officer cannot rely on an apparently unlawful order of his superior, as a justification. *Mitchell v. Harmony*, 13 H. 115....xix. 420.

2. An extra service or duty performed by an officer, under the employment of the proper department of the government charged with the execution of that duty, may be suitably compensated by such department, if not prohibited by some positive law. *Gratiot v. United States*, 15 P. 386....xiv. 106.

3. A clerk in the post-office department, who performs only the duties regularly incumbent on his office, cannot claim any extra compensation therefor. *United States v. Brown*, 9 H. 487....xviii. 232.

ACTION, 1; CLERKS OF COURTS, 7; DAMAGES, 10.

## OMNIA RITE ESSE ACTA.

## PRESUMPTIONS.

Where the record showed that two negotiable notes were declared on by the indorsee against the maker, and there was no averment which showed that the payee was competent to sue the maker in a court of the United States, but the declaration also contained the money counts for a sum large enough to cover the verdict and judgment; *Held*, That the court would intend either that the recovery was not had on the notes, or, if it were, that evidence of the necessary citizenship of the payee was given at the trial. *Bank of the United States v. Moss*, 6 H. 31....xvi. 590.

## ORDINANCE OF 1787.

## JURISDICTION, A. c. 3.

1. The effect of the ordinance of 1787 for the government of the territory northwest of the Ohio, considered. *Strader v. Graham*, 10 H. 82....xviii. 805.

2. The effect of the ordinance of 1787 discussed. *Pollard's Lessee v. Hagan*, 3 H. 312....xv. 391.

3. The act of March 2, 1805, (2 Stats. at Large 322,) granted to the inhabitants of the territory of Orleans, the rights secured to the people of the Northwestern Territory, by the ordinance of 1787, so far as the same had been conferred on the people of the Mississippi territory; but the political right to religious liberty, provided for in that ordinance and in this act of congress, ceased to depend thereon, when the State was admitted to the Union. If it

existed, it was under the constitution of the State alone. *Permoli v. First Municipality of New Orleans*, 8 H. 589 . . . . xv. 561.

## OUSTER.

SEISIN AND DISSEISIN.

## OYER.

PLEADING, E.

## PARDON.

A pardon is a private though official act of the executive, must be delivered to and accepted by the criminal, and cannot be noticed by the court unless it is brought before it judicially by plea, motion, or otherwise. *United States v. Wilson*, 7 P. 150 . . . . x. 435.

## PARENT AND CHILD.

EVIDENCE, E. 1; UNDUE INFLUENCE.

Neither under the law of Texas or Louisiana, could a father convey the title of his minor child, without permission from some tribunal. *Hoyt v. Hammekin*, 14 H. 346 . . . . xx. 216.

ASSIGNMENT OF CHOSSES IN ACTION, A. 14.

## PARTIES.

ADMIRALTY, B. 1; EQUITY, B. b. 1; PLEADING, A.

## PARTITION.

1. Bill in equity to set aside a partition on the ground of fraud. The record was so defective in respect to parties and evidence, that the decree of the district court, dismissing the bill, was affirmed. *Coy v. Mason*, 17 H. 580 . . . . xxi. 697.

2. Under the law of Maryland for the division of intestate estates, the jurisdiction of the court does not depend upon the fact that one or more of the heirs is of age. *Thompson v. Tolmie*, 2 P. 157 . . . . viii. 62.

3. When such proceedings are drawn in question collaterally, against a purchaser, every reasonable intendment is to be made in their support. *Ib.*

4. If the court had jurisdiction, the purchaser is not bound to look behind the decree. *Ib.*

5. The direction in the act, that the commission and proceedings thereon shall be recited in the deed, is complied with by reciting their substance. *Ib.*

## PARTNERSHIP.

A. RIGHTS AND POWERS OF PARTNERS IN RESPECT OF THE PROPERTY, BUSINESS, AND USE OF THE NAME OF THE FIRM, 352.

B. RIGHTS OF PARTNERS, 352.

C. RIGHTS OF THIRD PERSONS, 353.

D. DISSOLUTION, AND ITS CONSEQUENCES, 354.

A. RIGHTS AND POWERS OF PARTNERS IN RESPECT OF THE PROPERTY, BUSINESS, AND USE OF THE NAME OF THE FIRM

ADMIRALTY, B. 3; EVIDENCE, B. 2.

1. A note, payable to G. and G., *prima facie* imports that there is a partnership. *Matheson's Administrators v. Grant's Administrator*, 2 H. 263....xv. 114.

2. Though partnership articles do not name the firm, if the books are kept and bills and advertisements made in a particular style, as B and C, this becomes the name of the firm; and though some of its business is done in the name of one partner, this does not render his name the name of the firm, unless the jury can find it was agreed by the partners it should be so. *Le Roy v. Johnson*, 2 P. 186....viii. 77.

3. Two persons having carried on business as a firm, assumed to be a corporation, and afterwards, one of them, as agent for the supposed corporation, made a deed of mortgage of personalty, the other assenting thereto,—*Held*, that the deed was valid. *Anthony v. Butler*, 13 P. 423....xiii. 230.

4. Partners have the right, as between themselves, to control the possession of their assets, and appropriate them to the payment of claims by one partner on the firm. *McCormick v. Gray*, 13 H. 26....xix. 368.

5. An assignment by one partner, in the name of the copartnership, of partnership effects and credits, for the benefit of particular creditors, is valid. *Harrison v. Sterry*, 5 C. 289....ii. 267.

## B. RIGHTS OF PARTNERS.

1. A stipulation in articles of copartnership, that each partner is to bear his own expenses, does not apply to extra expenses of travelling, &c., while engaged in the business of the firm. *Withers v. Withers*, 8 P. 355... xi. 123.



2. A promissory note, given by one member of a commercial company, to another member, for the use of the company, will maintain an action at law by the promisee in his own name, against the maker, notwithstanding the money, when recovered, would belong to the company. *Van Ness v. Forrest*, 8 C. 30 . . . .iii. 10.

3. If one partner retire, and the others receive the partnership effects, and covenant to apply them to pay the debts of the firm, and pay over to him a certain sum, if so much should be collected, the retiring partner is entitled to an account and relief in equity. *Kelsey v. Hobby*, 16 P. 269 . . . .xiv. 290.

4. If the members of a copartnership agree among themselves, that the firm shall pay an individual partner's debt, it becomes an equitable claim against the assets of the firm. *Finley v. Lynn*, 6 C. 238 . . . .ii. 386.

5. An assignee of one copartner, may maintain a bill for an account, against the other partners and the agent of the partnership, which was formed to deal in lands. *Pendleton v. Wambersie*, 4 C. 73 . . . .ii. 23.

6. Two partners, residing in countries distant from each other, after the expiration of their partnership, through the agency of a third person, adjusted and settled their accounts; and in so doing, there was put to the credit of one of them, a sum, to cover a liability he was under for the firm, as a surety on custom-house bonds. Subsequently, by the election of the government to take a joint-judgment on the bonds, and by the death of the surety, his estate was exonerated. *Held*, that the other partner could not recover back one half the money. *Bispham v. Price*, 15 H. 162 . . . .xx. 453.

7. The exception of merchants' accounts in the statute of limitations, if it applies to accounts of partners, *inter sese*, does not include their stated accounts. *Ib.*

8. That statute was a bar in this case. *Ib.*

*Infra*, D. 2.

### C. RIGHTS OF THIRD PERSONS.

1. One partner cannot apply the partnership funds, or property, to the payment of his private debt, and the title of the partnership is not thus divested in favor of the private creditor, even if the latter was ignorant that the funds or property belonged to the partnership. *Rogers v. Batchelor*, 12 P. 221 . . . .xii. 701.

2. By the law of Louisiana, the contract of a mercantile firm creates an obligation *in solido*, and two of the partners may be sued thereon, if the third is out of the jurisdiction. *Breedlove v. Nicolet*, 7 P. 413 . . . .x. 527.

3. In equity, joint creditors cannot obtain the aid of the court to appropriate separate estate to the payment of their debts, *pari passu* with separate creditors, especially where the debtor has appropriated his separate estate towards paying his separate, to the exclusion of his joint debts, not having enough to pay the former. *Murrill v. Neill*, 8 H. 414 . . . .xvii. 641.

4. A testator, directing the continuance of a partnership of which he was a member at the time of his death, may either bind all, or a specific part, or only so much of his assets as are embarked in the business of the firm. *Burwell v. Cawood*, 2 H. 560 . . . .xv. 203.

5. An intention to render the general assets liable, is only to be made out by the use of unambiguous language; and as the will in question does not clearly manifest that intent, the creditors of the firm have no claim upon the general assets. *Ib.*

ACTION, 3.

#### D. DISSOLUTION, AND ITS CONSEQUENCES.

1. Where one partner dies, a creditor may go at once into equity for an account of his assets, and may and should join the surviving partner and the representative of another deceased partner. *Nelson v. Hill*, 5 H. 127.... xvi. 331.

2. Several distinct creditors may join in such a bill; and where the deceased partner was a member of two firms, the creditors of both firms may join, and may make the surviving partners of both firms, and the representatives of any deceased partner of either firm, parties defendant. *Ib.*

3. Secret stipulations in articles of copartnership, inconsistent with the usual powers of partners engaged in similar business, do not affect those dealing with a partner, on account of the firm, in ignorance of their existence. And this is applicable to dormant as well as to ostensible partnerships. *Winship v. Bank of United States*, 5 P. 529....ix. 457.

4. If the active partner in a firm, engaged in a business in the course of which it is usual to indorse notes and obtain discounts, does indorse a note in the name of the firm, and offers it for discount on account of the firm, and it is so discounted, the firm is liable, though there was a secret agreement between the partners that he would not indorse, and though he misapplied the proceeds of the note to his own use. *Ib.*

5. If one partner draw a bill in his own name, to obtain funds to pay a partnership debt, and so applies the funds, the firm is not liable. *Le Roy v. Johnson*, 2 P. 186....viii. 77.

CONTRACT, C. 8.

### PASSENGERS.

BAILMENT, B. 2.

## PATENTS FOR INVENTIONS

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3. INVENTION, AND ITS SUBJECTS.

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**A. PARTIES ENTITLED TO PATENTS.**

*Infra*, B. C.

**B. THE SUBJECT MATTER OF PATENTS.**

**1. NOVELTY.**

1. Under the 6th section of the patent act, of February 21, 1793, (1 Stats. at Large, 322,) if the thing patented had been in use, or had been described in a public work anterior to the supposed discovery by the patentee, the patent was void. *Evans v. Eaton*, 3 W. 454....iv. 260.

2. A prior construction and use of the thing patented, in one instance only, which had been finally forgotten, or abandoned, and never made public, so that, at the time of the invention by the patentee, the invention did not exist, will not render a patent invalid. *Gayler v. Wilder*, 10 H. 477....xviii. 466.

3. Action for infringing letters-patent. Under a claim of "the combination of the above-described parts, namely, the core and bridge, or guide-piece, the chamber and the die, when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other manner substantially the same." *Held*, that, to support this patent, it was not sufficient that the patentee had discovered a new property in lead, by means of which the above-described machinery could be used to form a new species of lead pipe, that the described combination of machinery must be novel. *Le Roy v. Tatham*, 14 H. 156....xx. 108.

4. Burden's patent for a bending lever, in a machine for making hook-headed spikes, held to be valid. *Troy Iron and Nail Factory v. Corning*, 14 H. 193 . . . .xx. 130.

5. Morse was the original and first inventor of a magnetic telegraph, capable of recording signs at a distance. *O'Reilly v. Morse*, 15 H. 62 . . . .xx. 402.

6. If he had been preceded by one of the European inventions, not patented, or described in a printed publication, his patent would still be valid. *Ib.*

7. A question of fact as to the date when a machine was constructed. *Troy Iron and Nail Factory v. Odiorne*, 17 H. 72 . . . .xxi. 376.

## 2. UTILITY.

*Infra*, B. 3.

## 3. INVENTION, AND ITS SUBJECTS.

1. Inquiries made, or information or advice received, by a patentee from men of science, do not impair his claim to an invention actually made by him. *O'Reilly v. Morse*, 15 H. 62 . . . .xx. 402.

2. The use of clay to make a particular kind of door-knob, that kind of knob being known, and clay having been used to make door-knobs of other kinds, and the practicability of using it for this kind of knob being obvious to an ordinary mechanic acquainted with the business, is not the subject of letters-patent. *Hotchkiss v. Greenwood*, 11 H. 248 . . . .xviii. 615.

## 4. UNITY OF SUBJECT.

Different patentable subjects may be united in one patent, if they all relate to the same general matter, or are otherwise connected together. *Hogg v. Emerson*, 6 H. 437 . . . .xvi. 780.

## 5. OTHER MATTERS.

1. Distinction between a patent for a machine, and one for a process, explained. *Corning v. Burden*, 15 H. 252 . . . .xx. 503.

2. A patent for a machine is not a patent for its product, and an assignee, restricted to the use of the machine within a particular district, may sell the product elsewhere. *Simpson v. Wilson*, 4 H. 709 . . . .xvi. 275.

## C. PROCEEDINGS TO OBTAIN, AMEND, EXTEND, AND REPEAL PATENTS.

### 1. THE SPECIFICATION.

1. Though under the 6th section of the act of 1793, (1 Stats. at Large, 322,) a judgment avoiding the patent cannot be entered unless the concealment or addition shall appear to have been made for the purpose of deceiving the public, yet no action will lie if the specification is defective under the 3d section. *Grant v. Raymond*, 6 P. 218 . . . .x. 94.

2. Where it is evident, on the face of letters-patent, for a composition of matter, that the proportions are so vaguely stated that one skilled in the art with which the composition is most nearly connected, could not make it by following the directions therein given, without experiment, it is the duty of the court to declare the patent void. *Wood v. Underhill*, 5 H. 1....xvi. 281.

3. But where a specific and clear general rule is given, and it does not appear to be inapplicable as a general rule, the patent may be valid, although it shows that, from the varying qualities of the materials employed, the general rule must be sometimes departed from. *Ib.*

4. It is not shown that William Woodworth was not the original and first inventor of the planing machine for which letters-patent were granted to him, December 27, 1828; nor that the specification is not sufficiently full and exact to satisfy the requirement of the patent laws. *Woodworth v. Wilson*, 4 H. 712....xvi. 276.

## 2. THE CLAIM.

1. A patentee having described and claimed his improvement on the cotton-gin, as consisting in a particular form of the rib, and a particular mode of fastening it to the framework of the gin: *Held*, 1. That this mode of fastening was an essential part of the invention claimed. 2. That if the defendant used a substantially different mode of fastening, he did not infringe. 3. That it was a question of fact for the jury, whether the mode used by the defendant was substantially different from that described and claimed by the plaintiff. *Carver v. Hyde*, 6 P. 513....xiv. 400.

2. If a patent be taken for the whole of a machine, when the patentee merely improved an existing machine, it is not valid. *Evans v. Eaton*, 7 W. 356....v. 283.

3. If the patentee intends to claim merely an improvement on an existing machine, he must point out in what his improvement consists, so as to distinguish it from what was before known. *Ib.*

4. A claim of a combination, which does not point out the particular elements which constitute the combination, but declares that it is made up of so much of the described machinery as produces a particular result, may be, and in this case was, sufficient; and under such a claim it is proper for the judge to instruct the jury that it is a claim for a combination, and that they are to find what described parts are essential to the result, and that these are the elements of the combination. *Silsby v. Foote*, 14 H. 218....xx. 143.

5. The plaintiff's patent was for making the body of a burden car in the form of the frustum of a cone, whereby certain mechanical principles were introduced and made operative, and a new and useful result produced. *Held*, 1. That though he had described no form, save a mathematically exact frustum of a cone, his patent covered also such variations of form as substantially embodied his mode of operation, and thereby attained the same kind of result. *Winans v. Denmead*, 15 H. 330....xx. 545.

6. One claim, construed to include every improvement—in which the motive power is the electric or galvanic current, and the result is the marking or printing intelligible characters, signs, or letters at a distance—was held to be broader than the patent laws allow, and invalid. *O'Reilly v. Morse*, 15 H. 62....xx. 402.

7. The patent of Evans was a grant of the general result of the whole machinery, and of the improvement of each machine described. *Evans v. Eaton*, 3 W. 454....iv. 260.

8. The amended letters-patent granted to William W. Woodworth, administrator, July 8, 1845, are not void for uncertainty, ambiguity, or multiplicity of claim, or any other cause made known to the court. *Wilson v. Rousseau*, 4 H. 646....xvi. 225. *Wilson v. Turner*, 4 H. 712....xvi. 276.

*Infra*, E. 4, 5.

### 3. PROCEEDINGS AT THE PATENT OFFICE, AND HEREIN OF ABANDONMENT AND DEDICATION.

1. An alien patentee made an invention in England, and came to this country in 1817; his invention was fraudulently disclosed in England, and went into public use there, and also in France, in 1820; the patentee knew of this use, but neglected to apply for a patent until 1822; the court below instructed the jury that the patentee had slept too long on his rights to be entitled to the benefit of a patent under the act of April 17, 1800, (2 Stats. at Large, 37.) *Held*, this instruction was correct. *Shaw v. Cooper*, 7 P. 292....x. 495.

2. Whatever may be the intention of the inventor, if he suffer his invention to go into public use, by any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent. *Ib.*

3. Under the patent act of February 21, 1793, (1 Stats. at Large, 318,) the first inventor cannot acquire a valid patent, if he suffer the thing invented to go into public use, or to be publicly sold for use, before his application for a patent. *Pennock v. Dialogue*, 2 P. 1....viii. 1.

4. Where a patentee invented an apparatus for breaking coal, and combined it with an apparatus for screening coal which he did not invent, and took a patent for the combination only, and afterwards took a patent for the breaking apparatus, and then surrendered both patents and took one for the breaking apparatus alone; *Held*, that his describing and not claiming the breaking apparatus in his first patent, and the surrender and cancellation of the second, did not deprive him of his right to a patent for the breaking apparatus. *Battin v. Taggart*, 17 H. 74....xxi. 378.

5. Though a separate invention was covered by one of the claims in a surrendered patent, if that claim was void as there made, the patentee may take a distinct patent therefor. *O'Reilly v. Morse*, 15 H. 62....xx. 402.

6. An American patent is not invalid because, on its face, it does not run for the same time as a previous foreign patent, taken by the patentee for the same invention. *Ib.*

7. If a patent was surrendered for a defective specification, before any act of congress on the subject, the rights of the patentee must be tested by the law as it stood when the original patent was issued. *Shaw v. Cooper*, 7 P. 292....x. 495.

8. The 7th section of the act of March 3, 1839, (5 Stats. at Large, 354,) is not limited to patents for machines, manufactures, and compositions of matter; it embraces an invention of a new improvement in the art of casting iron, by

giving an angular direction to the tube which conducts the metal to the mould. *M'Clurg v. Kingsland*, 1 H. 202....xiv. 567.

#### 4. SURRENDER AND REISSUE, AND THEIR EFFECTS.

1. It is not necessary to recite, in a reissued patent for an invention, that the prerequisites of a reissue have been complied with. *Philadelphia and Trenton Railroad Company v. Stimpson*, 14 P. 448....xiii. 588.

2. Where letters-patent have been extended, under the 18th section of the act of July 4, 1836, the commissioner of patents may accept a surrender and reissue amended letters, after the expiration of the original term. *Wilson v. Rousseau*, 4 H. 646....xvi. 225. *Wilson v. Turner*, 4 H. 712....xvi. 276.

3. Under the patent act of July 3, 1832, § 3, (4 Stats. at Large, 559,) as well as under that of July 4, 1836, § 18, (5 Stats. at Large, 122,) no use of the thing patented prior to a surrender on account of a defective specification, can confer a right to continue the use after the reissue of the letters in a corrected form. *Stimpson v. West Chester Railroad Company*, 4 H. 380....xvi. 153.

4. The 7th section of the act of March 3, 1839, (5 Stats. at Large, 354,) has reference to an original application for a patent, not to its reissue. *Ib.*

5. Whether the new patent be for a substantially different invention from that designed to be covered by the original patent, is a question of fact; but as the 13th section of the act of 1836, confers on the commissioner of patents power to issue the renewed patent in the cases described, if he does issue it, the inquiry afterwards must be limited to the fairness of the transaction. *Ib.*

6. It is to be presumed, that the reissued patent is for the same invention as the original patent. *O'Reilly v. Morse*, 15 H. 62....xx. 402.

7. Differences in the description, or specification of claims, are consistent with the identity of the thing designed to be patented in both patents; it being one object of allowing a surrender, to correct, by changing, the description, or the claim, or both. *Ib.*

8. Under the patent act of 1793, February 21, (1 Stats. at Large, 818,) the secretary of state had power to receive a surrender of a patent, cancel the record thereof, and issue a new patent for the unexpired portion of the term, when the defect in the specification arose from mistake, without fraud or misconduct of the patentee. *Grant v. Raymond*, 6 P. 218....x. 94.

#### 5. DISCLAIMER.

1. Though a disclaimer, under the 7th section of the act of March 3, 1837, (5 Stats. at Large, 193,) must state the extent of the interest of him who disclaims, if it state that he is the patentee, the implication that he owns the whole interest is sufficient. *Silsby v. Foote*, 14 H. 218....xx. 143.

2. Though a patentee has not disclaimed what the court holds to be invalid, if his claim to it had been sanctioned by the patent office and by a circuit court, his neglect is not unreasonable. *O'Reilly v. Morse*, 15 H. 62....xx. 402.

#### 6. CONSTRUCTION, AND ITS RULES.

1. Principles of construction of specifications. *Winans v. Denmead*, 15 H. 330....xx. 545



2. The laws passed to secure to inventors an exclusive right to their inventions, ought to be construed in the spirit in which they were made. *Grant v. Raymond*, 6 P. 218....x. 94.

3. In construing a patent, the intention of the parties, who are the government and the patentee, is entitled to great consideration. *Evans v. Eaton*, 3 W. 454....iv. 260.

4. The special act authorizing the patent, the petition for its issue, as well as the specification, resorted to for this intention. *Ib.*

5. The drawings, as well as the entire specification, may be referred to in explanation of what is patented. *Hogg v. Emerson*, 11 H. 587....xviii. 724.

6. Construction of a specification and claim of letters-patent for an improvement in rails, &c., *held* to be substantially a claim for a combination, and that the defendants, not having used one essential element of that combination, had not infringed. *Stimpson v. Baltimore and Susquehanna Railroad Company*, 10 H. 329....xviii. 412.

7. The schedule annexed to letters-patent is in our practice part of the letters, and may be resorted to, to explain or add to the title of the invention. *Hogg v. Emerson*, 6 H. 437....xvi. 780.

8. Rules for construing specifications, and descriptions of the things patented stated. *Ib.*

9. There is no substantial difference between the patent for an improved machine, and one for an improvement on a machine. *Evans v. Eaton*, 3 W. 454....iv. 260.

#### 7. SCIRE FACIAS.

The 10th section of the patent act of February 21, 1793, (1 Stats. at Large, 823,) requires a record to be made of the preliminary proceedings, and a *scire facias* to issue, and questions of fact to be tried by a jury, before letters-patent can be repealed. A repeal cannot be ordered under a rule to show cause. *Ex parte Wood*, 9 W. 603....vi. 207.

#### 8. EXTENSION, AND TO WHOSE BENEFIT IT ENURES.

1. The 18th section of the patent act of July 4, 1836, (5 Stats. at Large, 124,) authorized an extension of letters-patent on the application of an administrator of the deceased patentee, who had in his lifetime disposed of the entire right granted by the letters-patent. *Wilson v. Rousseau*, 4 H. 646....xvi. 225. *Wilson v. Turner*, 4 H. 712....xvi. 276.

2. Such an extension enured to the benefit of the administrator only, as the representative of the deceased; but persons in the lawful use of machines at the expiration of the first term, may lawfully continue such use of those specific machines. *Ib. Ib.*

3. A covenant for the benefit of any "renewal" of a patent, made in 1828, must be construed with reference to the law concerning renewals then existing, and does not embrace a new and distinct right, created by a subsequent law. *Ib. Ib.*

4. One in the lawful use and ownership of a patented machine, at the time of the expiration of extended letters-patent, may lawfully continue to use that

identical machine, though the term of the letters-patent has been still further extended by a special act of congress, there being nothing in that act to deprive him of this right. *Bloomer v. McQuewan*, 14 H. 539....xx. 326.

#### D. ASSIGNMENTS AND LICENSES, AND THE RIGHTS AND POWERS THEREBY CREATED.

1. Under the act of February 21, 1793, (1 Stats. at Large, 318,) the assignee of part of a patent right, cannot maintain an action at law. *Tyler v. Tuel*, 6 C. 324....ii. 419.

2. The title to letters-patent granted to an inventor, enures to his assignee under a deed recorded in the patent-office before the letters were issued, and no further conveyance from the patentee to the assignee is necessary to vest the legal title in the latter. *Gayler v. Wilder*, 10 H. 477....xviii. 466.

3. An assignee of a sectional interest in a patent must have the entire right within the territory specified, to enable him to sue in an action at law under the 14th section of the patent act of July 4, 1836, (5 Stats. at Large, 123.) *Ib.*

4. An assignee of a right to use a patented planing-machine, who has the right to continue the use of a particular machine after an extension of the term of the patent, according to the decision in this court in *Wilson v. Rousseau*, 4 How. 646, may replace the knives when worn out, without destroying the identity of that particular machine. *Wilson v. Simpson*, 9 H. 109....xviii. 58.

5. The act of January, 1808, for the relief of Oliver Evans, does not authorize those who erected his machinery, between the expiration of his old patent and the issuing of the new one, to use it after the issuing of the latter. *Evans v. Jordan*, 9 C. 199....iii. 331.

6. Construction of an agreement of compromise—*held*, not to operate as a license to the appellees. *Troy Iron and Nail Factory v. Corning*, 14 H. 193....xx. 130.

#### PRESUMPTIONS, 11.

#### E. INFRINGEMENT. (*Supra*, C. 2, 6.)

1. A contract to buy all the product of a patented machine during a certain period, does not render the purchaser liable to an action for using the machine. *Keplinger v. De Young*, 10 W. 358....vi. 433.

2. *Aliter*, if the contract is only a colorable purchase of the product, but really amounts to a hiring of the machine. *Ib.*

3. Where one particular geometrical form alone, is capable of embodying the invention, that form must be used, to amount to an infringement; *aliter*, where that form is the best, but other forms may and do embody the invention. *Winans v. Denmead*, 15 H. 330....xx. 545.

4. A patent for a combination of three distinct things, is not infringed by combining two of those things with a third, which is substantially different from

the third element described in the specification. *Prouty v. Ruggles*, 16 P. 336....xiv. 331.

5. Where that third element, as described in the specification, was, forming the top of the standard of a plough, so as to secure, brace, and draft, by extending the standard back from the bolt to such a distance as to form a brace to the beam, and making the after part of this extension square, in such a manner that, being jogged into the beam, it relieved the bolt in a heavy draft. *Held*, that the specification and claim covered only this described manner of relieving the bolt, and if the defendant did not jog the bolt into the beam, he did not infringe. *Ib.*

## F. REMEDY.

### 1. AT LAW. (CORPORATIONS, D. 3.)

The grantee of an extensive right to construct, use, and vend two patented machines within a specified territory, may maintain an action in his own name for an infringement of the patent within that territory, under the 14th section of the patent act of July 4, 1836, (5 Stats. at Large, 123.) *Wilson v. Rousseau*, 4 H. 646....xvi. 225; *Wilson v. Turner*, 4 H. 712....xvi. 276.

DAMAGES, 17; ERROR, B. 12; E. 5; F. 10.

### 2. IN EQUITY. (EQUITY, B. b. 1.)

In a suit in equity for an injunction, and account of profits of a patented machine, the defendant is accountable only for what profits he actually made, not for what, by diligence and skill, he might have received. *Livingston v. Woodworth*, 15 H. 546....xx. 624.

### 3. OTHER MATTERS.

1. Congress may modify the rights of a patentee and of the public, by legislation after the emanation of a patent, provided it does not take away existing rights of property. *M'Clurg v. Kingsland*, 1 H. 202....xiv. 567.

2. Actual damages are to be found by a jury in a patent cause. What they are, cannot be determined by any one precise rule of law, applicable to all cases. If the patentee finds it for his interest to retain the entire monopoly, the profits realized by the infringer may afford a rule. If he habitually sells licenses, the price of a license may afford the proper measure. To instruct that the measure of damages is the same, whether the patent covers an entire machine or an improvement on it, is erroneous. There is no legal presumption binding on a jury, that third persons would have purchased of the patentee what they bought of the infringer, if the latter had not made and sold the thing patented. *Seymour v. McCormick*, 16 H. 480....xxi. 267.

## G. PLEADINGS AND EVIDENCE.

1. Under the 6th section of the patent act, of February 21, 1793, (1 Stats. at Large, 322,) it was not necessary, in the notice of special matter, to specify the places where the thing patented was alleged to have been used before the invention of the patentee was made. *Evans v. Eaton*, 3 W. 454....iv. 260.

2. Evidence that those engaged in such alleged prior use, had paid the patentee for licenses, was admissible for the patentee. *Ib.*

3. The burden is on the defendant, in a patent cause, to show he gave the notice required by statute to enable him to examine a witness as to the novelty of the invention. *Philadelphia and Trenton Railroad Company v. Stimpson*, 14 P. 448....xiii. 588.

4. If a patent has been granted to the defendant for what he uses, he may put it in evidence in an action for an infringement. *Corning v. Burden*, 15 H. 252....xx. 508.

5. A reference to Ure's dictionary, without specifying any page, article, or subject therein, is not a sufficient notice of special matter, under the 15th section of the patent act of July 4, 1836, (5 Stats. at Large, 123.) *Silsby v. Foote*, 14 H. 218....xx. 143.

## PAYMASTER.

A paymaster in the army, appointed under the act of April 24, 1816, (3 Stats. at Large, 297,) is not entitled to the pay and emoluments of a major of cavalry, only to those of a major of infantry. *Wetmore v. United States*, 10 P. 647....xii. 283.

## PAYMENT.

BILLS, &c. *K.*; MONEY; PRIORITY OF PAYMENT OF THE UNITED STATES.

A. WHAT AMOUNTS TO, 363.

B. PRESUMPTIONS AS TO, 364.

C. APPROPRIATION OF, 365.

D. RECOVERY BACK, 365.

## A. WHAT AMOUNTS TO.

RECEIVERS AND DISBURSERS OF PUBLIC MONEY, C. 2.

1. A creditor receiving notes of a third person as a conditional payment, is

bound to use due diligence to collect them, and his laches will render the payment absolute. *Douglass v. Reynolds*, 7 P. 113....x. 415.

2. A check on a bank which does not pay specie, drawn on account of a debt due to the drawer from the bank for labor, though exchanged by the taker for a certificate of deposit, is not payment, unless the drawer and taker so agreed. *Downey v. Hicks*, 14 H. 240....xx. 156.

3. The drawer of bills, who was the principal debtor, for the purpose of relieving the accommodation acceptor, made a contract with the indorsee to satisfy the bills, and this agreement was executed on the part of the drawer while the bills were out of the hands of the indorsee, who had transferred them to the appellants, as security for his indebtedness to them; subsequently, the indorsee obtained the title to the bills. *Held*, that as soon as he did so they were extinguished by force of the satisfaction previously given and received. *Farmers' Bank of Virginia v. Groves*, 12 H. 51....xix. 25.

4. If an agent to receive payment of a debt undertakes to compromise and release it, and his principal refuses to ratify his act or to receive the money, and gives notice thereof to the debtor, and the money paid on the attempted compromise remains in the hands of the agent, it is at the risk of the debtor. *Curtis v. Innerarity*, 6 H. 146....xvi. 632.

5. A debtor of the United States, who puts evidence of debts due to himself into the hands of a public officer of the United States, to collect and apply the money, when received, to the credit of such debtor in account with the United States, is not entitled to such credit until the money gets into the hands of a public officer of the United States entitled to receive it. *United States v. Patterson*, 7 C. 575....ii. 676.

6. Its being in the hands of an agent of a person who, at the time when the claims were put into his hands for collection, was a public officer of the United States, entitled to receive debts due to the United States, but whose office became extinct before the money was received by his agent, is not sufficient to entitle such debtor to a credit in account with the United States therefor. *Ib.*

7. An agreement to pay "in the paper of the Miami Exporting Company, or its equivalent," is satisfied by a tender of the paper of that company, and the promisee can recover in specie only its market, and not its nominal value. *Robinson v. Noble's Administrator*, 8 P. 181....xi. 63.

8. An acknowledgment that payment of a less sum than that secured by a bond, is in full satisfaction of all claims, is evidence that only that balance remained due, in consequence of prior payments. *Henderson v. Moore*, 5 C. 11....ii. 176.

EXECUTORS, &c. D. 1, 2; SURETY, 1.

## B. PRESUMPTIONS AS TO. (Bond, C. 3.)

1. To raise a presumption of payment of a bond, twenty years must have elapsed exclusive of the period of the plaintiff's disability. *Dunlop v. Ball*, 2 C. 180....i. 468.

2. The presumption of payment from lapse of time may be repelled. *Higginson v. Mein*, 4 C. 415 . . . . ii. 155.

3. Issue directed as to the fact of payment. *Ib.*

### C. APPROPRIATION OF.

1. If the debtor does not elect to make a particular application of a payment, at the time it is made, the creditor may, at any time afterwards, elect to what debt to apply it. *Mayor and Commonalty of Alexandria v. Patten*, 4 C. 817 . . . . ii. 121.

2. If neither the debtor nor the creditor has made an application of payments, it devolves on the court to make it, and being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious. *Field v. Holland*, 6 C. 8 . . . . ii. 303.

3. It is not necessary that the debtor should expressly direct the application of a payment to make it applicable in law to a particular demand; his election, as well as the assent, of the creditor, may be manifested by circumstances. *Tayloe v. Sandiford*, 7 W. 13 . . . . v. 198.

4. A refusal to pay one debt, and an acknowledgment of another with a delivery of the sum due upon it, would be sufficient evidence of the election of the debtor to apply the payment to the latter debt. *Ib.*

5. The privilege of a creditor to make an appropriation of payments, cannot be exercised after a controversy has arisen. The law, then, makes the appropriation, and in case of a collector's accounts, in which balances had been struck only to make rests, payments were applied according to the priority of time. *United States v. Kirkpatrick*, 9 W. 720 . . . . vi. 244.

6. When a collector of revenue has given two bonds for his official conduct at different periods, and with different sureties, a promise by the supervisor to apply his payments exclusively to the discharge of the first bond, although some of the payments were for money collected and paid after the second bond was given, does not bind the United States, and does not amount to an application of the payments to the first bond. *United States v. January*, 7 C. 572 . . . . ii. 678.

### D. RECOVERY BACK.

If the party paying, declare that he makes the payment to get possession of his goods, that he intends to sue to recover it back, and that the collector must not pay it over, the collector is liable to an action. *Elliott v. Swartwout*, 10 P. 137 . . . . xii. 46.

## PEDIGREE.

EVIDENCE, E. 2, K.

## PENALTIES AND FORFEITURES.

ADMIRALTY, B. 1; EMBARGO, B. C.; REVENUE LAWS, F.; SHIPPING, A.

A. GENERALLY, AND WHEN ATTACH OR TAKE EFFECT, 366.

B. FOR PENALTIES OF BONDS AND THE REDUCTION THEREOF, 366.

C. RECOVERY AND REMISSION, 366.

## A. GENERALLY, AND WHEN ATTACH OR TAKE EFFECT.

ADMIRALTY, C. b. 3. FORFEITURE.

1. Persons in possession of a vessel and cargo, neither as captors, nor under any authority derived from their owners, cannot subject them to forfeiture for a breach of municipal law. *The Bello Corrunes*, 6 W. 152....v. 44.

2. A gross sum, to be paid on non-performance, is taken to be a penalty, where the parties have not manifested an intention to consider it as damages, and this presumption is much strengthened if the parties call it a penalty. *Taylor v. Sandiford*, 7 W. 13....v. 198.

3. An agreement to perform a certain work, by a limited time, under a certain penalty, is not to be construed as liquidating the damages. *Ib.*

4. The forfeiture under the neutrality act of 1794, (1 Stats. at Large, 381,) attaches at the moment of the commission of the offence. *Gelston v. Hoyt*, 3 W. 246....iv. 211.

5. Under the act of February 28, 1803, § 2, (2 Stats. at Large, 203,) the master of a vessel which touches at a foreign port to obtain advices, but does not enter, nor do any business there, is not bound to deposit the register with the consul of the United States; such presence in a port is not an "arrival," within the meaning of that act. *Harrison v. Vose*, 9 H. 372....xviii. 181.

6. It is a general principle that a law of forfeiture can be applied only to those cases in which the means prescribed for the prevention of a forfeiture can be employed. *Peisch v. Ware*, 4 C. 347....ii. 132.

7. A municipal forfeiture under the laws of the United States, is absorbed in the more general operation of the law of war. *The Sally*, 8 C. 382....iii. 182.

8. A party who offers an excuse for violating a penal statute, must make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence. *Brig Struggle v. United States*, 9 C. 71....iii. 269.

CAPTURE, C. 10; CONSTITUTIONAL LAW, J. 34; PUBLIC LANDS OF STATES, A. 68; SHIPPING, A. 3, 4.

## B. PENALTIES OF BONDS AND THE REDUCTION THEREOF.

BOND, G.

## C. RECOVERY AND REMISSION.

REVENUE LAWS, F.; SECRETARY OF THE TREASURY.

1. Congress having committed to the secretary of the treasury the pow-



er to determine whether the person incurring a forfeiture had been guilty of any fraud or wilful negligence, his finding is conclusive. *United States v. Morris*, 10 W. 246....vi. 395.

2. If an averment of the facts on which the secretary acted were necessary, the want of it would be aided by pleading over in such a form as to admit the truth of those facts. *Ib.*

## PERJURY.

1. The act of March 1, 1823, § 3, (3 Stats. at Large, 771,) includes an affidavit taken before a state magistrate, authorized to administer oaths, in pursuance of a regulation, or in conformity with a usage of the treasury department, under which the affidavit would be admissible evidence at the department in support of a claim against the United States, and perjury may be assigned thereon. *United States v. Bailey*, 9 P. 238....xi. 341.

2. On trial of an indictment for perjury in taking the owners' oath under the act of March 1, 1823, § 4, (3 Stats. at Large, 730,) it is not necessary for the prosecution to produce a living witness to testify to the falsehood of the fact sworn to; if the jury believe the written evidence, contained in the defendant's letters, and in other documents, recognized by him as genuine, proves he made a false and corrupt oath, he may be convicted. *United States v. Wood*, 14 P. 430....xiii. 576.

3. An indictment for perjury need not refer to the act of congress which required the oath in question to be taken; it should aver the facts which constituted the occasion for taking the oath, and the court will take notice of any act of congress which required it. *United States v. Nickerson*, 17 H. 204 . . .xxi. 458.

## PILOTS AND PILOTAGE.

ADMIRALTY, A. 2; CONSTITUTIONAL LAW, M. 7-9; SALVAGE, A. 1.

## PIRACY.

ADMIRALTY, B. 1; TREATIES, A. 3.

1. The act of the 3d of March, 1819, § 5, (3 Stats. at Large, 513,) referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of congress to define and punish that crime. *United States v. Smith*, 5 W. 153....iv. 597.

2. The crime of piracy is defined by the law of nations with reasonable certainty. *Ib.*

3. Robbery, or forcible depredation, upon the sea, *animo furandi*, is piracy by the law of nations, and by the act of congress. *Ib.*

4. The 8th section of the act of the 30th of April, 1790, (1 Stats. at Large,

113,) for the punishment of certain crimes against the United States, is not repealed by the act of the 3d of March, 1819, (3 Stats. at Large, 513.) *United States v. Furlong*, 5 W. 184....iv. 604.

5. The act of the 3d of March, 1819, § 5, furnishes a sufficient definition of piracy; and it is defined to be robbery on the seas. *Ib.*

6. A vessel loses her national character by assuming a piratical character; and a piracy committed by a foreigner, from on board such a vessel, upon any other vessel whatever, is punishable under the 8th section of the act of the 30th of April, 1790. *Ib.*

7. On an indictment for piracy, the jury may find the national character of a vessel upon such evidence as will satisfy their minds, without the certificate of registry, or other documentary evidence, being produced, and without proof of their having been on board. *Ib.*

8. The 8th section of the act of 1790, extends to piracy by a crew of a foreign vessel on a vessel exclusively owned by foreigners. *Ib.*

9. On an indictment for piracy, the national character of a merchant vessel of the United States may be proved without evidence of her certificate of registry. *Ib.*

10. A robbery committed on the high seas, although such robbery if committed on land would not by the laws of the United States be punishable with death, is piracy, under the 8th section of the act of 1790; (1 Stats. at Large, 113;) for the punishment of certain crimes against the United States; and the circuit courts have jurisdiction thereof. *United States v. Palmer*, 3 W. 610....iv. 314.

11. The crime of robbery, as mentioned in the act, is the crime of robbery as recognized and defined at common law. *Ib.*

12. The crime of robbery committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, is not piracy under the act, and is not punishable in the courts of the United States. *Ib.*

13. A commission issued by Aury, as "Brigadier of the Mexican Republic," (a republic whose existence is unknown and unacknowledged,) or as "Generalissimo of the Floridas," (a province in the possession of Spain,) will not authorize armed vessels to make captures at sea. *United States v. Klintock*, 5 W. 144....iv. 593.

14. Under the particular circumstances of this case, showing that the seizure was made, not *jure belli*, but *animo furandi*, the commission was held not to exempt the prisoner from the charge of piracy. *Ib.*

15. The act of the 30th of April, 1790, § 8, (1 Stats. at Large, 113,) extends to all persons on board all vessels, which throw off their national character by cruising piratically, and committing piracy on their vessels, and is not repealed by the act of March 3, 1819, (3 Stats. at Large, 513.) *Ib.*

16. The act of March 3, 1819, (3 Stats. at Large, 510,) authorizes a seizure and condemnation of a foreign vessel for an act of piratical aggression on the high seas. *The Marianna Flora*, 11 W. 1....vi. 497.

17. But an act of aggression must be with intent to rob, to come within the law. *Ib.*

CRIMINAL PROCEDURE, A. 2; FORFEITURE, 2, 3; LAW OF NATIONS, C. 8

PLEADING.

ASSUMPSIT, C.; BOND, H.; CASE; COVENANT, A.; CRIMINAL PROCEDURE, A.; DEBT; EJECTMENT, A.; PRACTICE, II. C.; REPLEVIN; TRESPASS; TROVER; AND FOR PLEADING IN PARTICULAR CASES, *see* APPROPRIATE TITLE.

- A. PARTIES, 369.
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- H. PLEAS TO THE JURISDICTION, 374.
- I. PLEAS IN ABATEMENT, 374.
- J. PLEAS PUIS DARREIN, 374.
- K. DEMURRER, 375.

A. PARTIES.

1. If two joint owners of merchandise consign it to a merchant for sale, and inform him that each owns one moiety; and if they give separate and variant instructions, each for his own moiety, one of the consignors alone may maintain a separate action against the consignee for a violation of his separate instructions. *Hall v. Leigh*, 8 C. 50....iii. 20.

2. If the plaintiff declare against two, on a judgment, he cannot take judgment against one alone, until he has gone through with such proceedings as the law provides to compel the appearance of the other. *Barton v. Petit*, 7 C. 194....ii. 510.

EJECTMENT, A. 1; INSOLVENT LAWS, B. 1.

B. DECLARATION. (BAILMENT, B. 2; BILLS, &c. G. 2; INSURANCE, H. 2.)

1. Generally, the declaration must aver every substantive fact necessary to constitute the right of action. *Bank of the United States v. Smith*, 11 W. 171....vi. 547.

2. An omission to show in a declaration how the plaintiff is heir, is not bad on general demurrer. *Day v. Chism*, 10 W. 449....vi. 472.

3. So, if plaintiff declares as devisee, and omits to set out the will. *Ib.*

4. A good title, defectively stated in a declaration, is aided by verdict; but a defective or bad title is not. *McDonald v. Hobson*, 7 H. 745 . . . . xvii. 386.

5. An averment in a declaration, that the legislature had no authority to convey, is not answered by a plea that the governor had authority to convey. *Fletcher v. Peck*, 6 C. 87 . . . . ii. 328.

6. Though a count in *assumpsit* contain no allegation of damage, it is not bad on error. *Bank of the Metropolis v. Guttschlick*, 14 P. 19 . . . . xiii. 322.

7. An averment that a banking corporation promised, "through its president and cashier," without alleging their authority, is sufficient. *Ib.*

8. The breach assigned being, that the defendant refused to convey, an allegation that the plaintiff was evicted, is surplusage. *Ib.*

9. A count described the agreement as a promise to convey in fee-simple, free from incumbrance, and averred that the defendant had no title. *Held*, it was unnecessary to decide whether it was the legal effect of the agreement that the land was to be free from incumbrances, as the defendant had broken the agreement to convey, even if construed otherwise. *Ib.*

10. A declaration against an indorser of a foreign bill, which does not allege notice of the protest, is bad, on error. *Slacum v. Pomery*, 6 C. 221 . . . . ii. 377.

11. It is not necessary to allege in the declaration that the note is lost, to entitle the plaintiff to introduce secondary evidence. *Renner v. Bank of Columbia*, 9 W. 581 . . . . vi. 195.

12. Nor need he show it is not in existence, or produce a notarial copy. It is enough that he cannot find it, and that he does not intentionally keep it back. *Ib.*

13. A declaration in the *debet* held not erroneous. *Brown v. Barry*, 3 D. 365 . . . . i. 261.

14. In a count against the drawer for non-payment, it is not necessary to aver that the bill was accepted, or if not accepted that it was protested for non-acceptance. *Ib.*

15. A declaration in debt, founded on the statute of Virginia, for the principal, interest, damages, and costs of protest of a bill of exchange, is bad on error, if it do not aver the amount of those costs. *Wilson v. Leno*, 1 C. 194 . . . . i. 395.

16. A declaration in an action of debt, founded on a decree in chancery, for 860*l.* 12*s.* 1*d.*, with interest from a day named, to the date of the decree, held bad on error, the clause giving interest not being noticed in the declaration. *Thompson v. Jameson*, 1 C. 283 . . . . i. 412.

17. Upon oyer, if the declaration misdescribes the date of the bond, it is bad on general demurrer. *Cooke v. Graham's Administrator*, 3 C. 229 . . . . i. 565.

18. A count, stating the making of a negotiable note by the defendant, payable to the plaintiff, the indorsement by the latter, protest of the note for non-payment, due notice of protest to the plaintiff, payment thereof by him, and a promise by the defendant, in consideration of the premises, to pay to the plaintiff the contents of the note, together with the cost of protest, is sufficient to support a judgment. *Morgan v. Reintzel*, 7 C. 273 . . . . ii. 526.

19. Trespass, *de bonis asportatis*, is a transitory action, and it is not neces-

sary to lay in the count the true venue, and also the venue for trial under a *scilicet*. *M. Kenna v. Fisk*, 1 H. 241....xiv. 587.

BILLS, &c. E. 14, 15; INTEREST, C. 4; USAGE, 4.

### C. PLEAS IN BAR, REPLICATIONS, &c. (CONSTITUTIONAL LAW, C. 2.)

1. The general issue, pleaded to an action by a corporation, admits the competency of the plaintiff to sue in that action. *Society for the Propagation of the Gospel, &c. v. Pawlet*, 4 P. 480....ix. 160.

2. A plea need answer only the gist of the action, and if the matter in aggravation be relied on as a substantive trespass, it should be replied to by a new assignment. *Gelston v. Hoyt*, 3 W. 246....iv. 211.

3. A defendant cannot plead that the only evidence of a breach of a bond consists in a certain paper, and then proceed to show that it does not prove a breach; he is not allowed to make the case turn on his allegations concerning the proofs of his adversary. *United States v. Girault*, 11 H. 22....xviii. 535.

4. A plea which avers that the evidence of the plaintiff is so and so, and then proceeds to answer it, is bad. *Christy v. Scott*, 14 H. 282....xx. 188. *Same v. Findley*, 14 H. 296....xx. 189. *Same v. Young*, 14 H. 296....xx. 189. *Same v. Henley*, 14 H. 297....xx. 189.

5. If the defendant has a defence, provided the plaintiff claim under a particular title, and is obliged to plead such defence specially, he may aver in his plea that the plaintiff does so claim, and then state his defence to that title; in such case, the allegation concerning the plaintiff's title, is traversable. *Ib. Ib. Ib.*

6. If a disclaimer of part, and plea to the rest, is so vague that the disclaimer may cover the land demanded, the plea is bad. *Ib. Ib. Ib. Ib.*

7. An error in the prayer for judgment, in a plea in bar, will not prevent the rendition of the judgment appropriate to the substance of the plea, confessed by general demurrer. *Withers v. Greene*, 9 H. 213....xviii. 104.

8. If the declaration be upon a joint note, and the defendant plead that the note is the separate note of one of the defendants, and was given to and accepted by the plaintiff, in full satisfaction of the debt, this plea is bad upon special demurrer, because it amounts to the general issue. *Van Ness v. Forest*, 8 C. 30....iii. 10.

9. A denial by the defendant that his testator gave authority to A to draw a bill of exchange, is not a denial of the subsequent assent of his testator to the drawing of such bill. *Olark's Executors v. Van Riemsdyk*, 9 C. 153....iii. 304.

10. To a claim for money not payable without a demand, the defendant pleaded that the cause of action did not accrue within, &c. This is a good plea, and if no demand was made till within six years, the plaintiff should not have so replied as to confess the plea. *United States v. Buford*, 3 P. 12....viii. 266.

11. Where several defendants unite in a plea of *non est factum*, if the instrument appear to be the deed of any one of those so uniting in the plea, the issue must be found for the plaintiff. *United States v. Linn*, 1 H. 104....xiv. 510.

12. The plea of not guilty in trespass, only puts the matter of the declaration in issue, and a variance between it and the writ cannot be noticed by the court. *McKenna v. Fisk*, 1 H. 241 . . . .xiv. 587.

13. A writ of *scire facias* contains traversable facts, and the plea is properly to the writ. *Winder v. Caldwell*, 14 H. 434 . . . .xx. 272.

14. A replication which fortifies the declaration, is not a departure ; and if it avoids the plea, should conclude with a verification. *Wilson v. Codman's Executor*, 3 C. 193 . . . .i. 556.

15. A plea by a collector of customs, that the bond of an importer was due and unpaid on the 5th of November, shows cause for rejecting a bond tendered on the 7th of November, and is good on special demurrer. *Olney v. Arnold*, 3 D. 308 . . . .i. 235.

16. Where the facts put in issue, by an assignment of a breach of a sheriff's bond, have been once tried on an issue made up according to a law of the State, they cannot be again drawn in question ; and as it is a question of law, on comparison of the records, whether they were in issue, a replication which attempts to put this question to the jury, is bad. *Chapman v. Smith*, 16 H. 114 . . . .xxi. 48.

BOND, H. 8 ; EXECUTORS, &c. C. 1 ; FRAUD, A. 1.

#### D. CERTAINTY, VARIANCE AND DUPLICITY.

1. Variances between the writ and declaration cannot be taken advantage of by general demurrer. *Duval v. Craig*, 2 W. 45 . . . .iv. 20.

2. An allegation that the defendant, by A. C., his agent, made the note, is sufficient. *Childress v. Emory*, 8 W. 642 . . . .v. 530.

3. A variance can only be taken advantage of at the trial. *Gorman v. Lenox's Executors*, 15 P. 115 . . . .xiv. 44.

4. If a promissory note be made payable at a particular place, it must be so averred in the declaration ; if not, the variance is fatal. *Sebree v. Dorr*, 9 W. 558 . . . .vi. 183.

5. A variance between the writ and the declaration cannot be taken advantage of under the general issue. *Chirac v. Reinecker*, 11 W. 280 . . . .vi. 595.

6. A plea was held to be bad, for duplicity, which set up an accord and compromise, and also lapse of time, as defences. *Rhode Island v. Massachusetts*, 14 P. 210 . . . .xiii. 429.

7. If a declaration describe a note, payable at a particular place, as payable generally, it is a fatal variance. *Covington v. Comstock*, 14 P. 43 . . . .xiii. 335.

8. A variance between an account filed to obtain an attachment, and the declaration filed after the defendant appeared and discharged the attachment, is of no importance. *Barry v. Foyles*, 1 P. 311 . . . .vii. 592.

9. In a writ of *capias*, by which an action was commenced, the two defendants were described as merchants, and surviving partners of a firm ; in the first count of the declaration, a promise by them, as surviving partners, was alleged ; in the second count, the promise declared on was by "the said defendants ;" *Held*, that evidence of a promise, made after the death of the deceased

partner, was admissible under the second count. *Schimmelpennick v. Turner*, 6 P. 1....x. 1.

10. If the plaintiff, in his declaration, claims the whole tract, a deed, showing that he has only an undivided interest in the tract, may be given in evidence. *Doe v. M'Farland*, 9 C. 151....iii. 802.

11. If a declaration on a contract, by mistake, contain the name of the vendee, in a context which shows that the vendor was intended, the variance is not material. *Ferguson v. Harwood*, 7 C. 408....ii. 596.

12. A note payable at sixty days, cannot be given in evidence to support a count upon a note, which count does not state when the note was payable. The variance is fatal; and evidence cannot be given that the note was inadvertently misdescribed. *Sheehy v. Mandeville*, 7 C. 208....ii. 514.

18. Under an allegation of negligence by a postmaster, evidence cannot be given of negligence of his sworn assistant. *Dunlop v. Munros*, 7 C. 242....ii. 522.

14. An immaterial averment, not matter of description of a written instrument, need not be proved. *Wilson v. Codman's Executor*, 3 C. 198....i. 556.

CONTRACT, I. 8; CRIMINAL LAW, D. 8.

### E. PROFERT AND OYER.

1. If profert be made of letters testamentary, and oyer is not craved, the court cannot notice any defect in the letters. *Childress v. Emory*, 8 W. 642....v. 530.

2. Oyer is not demandable of a record; nor, in an action upon a bond for performance of covenants in another deed, can oyer of such deed be craved; for the defendant, and not the plaintiff, must show it, with a profert of it, or an excuse for the omission. *Sneed v. Wister*, 8 W. 690....v. 543.

3. If oyer be improperly demanded, the defect is aided on a general demurrer; but it is fatal to the plea, where it is set down as a cause of demurrer. *Ib.*

4. Whether in Alabama a *profert* of letters of administration is necessary, *quære*; but if so, the want of it is cured by a verdict. *Matheson's Administrators v. Grant's Administrator*, 2 H. 263....xv. 114.

5. A plea of performance of the condition of a bond, without oyer, is bad on demurrer. *United States v. Arthur*, 5 C. 257....ii. 250.

6. If *profert* is made in one count, and oyer granted, the deed on the record is taken to be that declared on in that count only. *Hughes v. Moor*, 7 C. 176....ii. 506.

DEBT, A. 8.

### F. DEFECTS CURED BY PLEADING OVER.

The plea of non-assumpsit waives a plea to the jurisdiction then on the record, and it is not error that no further notice was taken of it. *Bailey v. Dozier*, 6 H. 28....xvi. 587.

PENALTIES, &c. C. 2.



## G. DEFECTS CURED BY VERDICT. (BILLS, &amp;c. E. G. 4.)

1. If the jury find specially the value of foreign money, the want of an averment of the value in the declaration is cured. *Brown v. Barry*, 3 D. 365.... i. 261.

2. A general averment in a declaration, of readiness to perform an agreement to take a lease, is good after verdict. *Carroll v. Peake*, 1 P. 18.... vii. 428.

## H. PLEAS TO THE JURISDICTION. (JURISDICTION, B. a. 1, I.)

1. A plea to the jurisdiction, by a corporation, put in by its attorney, is good. *Commercial and Railroad Bank of Vicksburg v. Slocumb*, 14 P. 60.... xiii. 346.

2. The question of citizenship constitutes no part of the issue upon the merits; it must be raised by a plea to the jurisdiction. *D'Wolf v. Rabaud*, 1 P. 476.... vii. 672.

3. If the record contains sufficient averments of citizenship to give the court jurisdiction, the defendant must traverse them by a proper plea to the jurisdiction; and the burden of proof is on him to disprove those averments. If he plead to the merits, the jurisdiction is admitted. *Sheppard v. Graves*, 14 H. 505.... xx. 305.

4. The next preceding decision, *Sheppard v. Graves*, 14 H. 505, applied to this case. *Sheppard v. Graves*, 14 H. 512.... xx. 309.

PRACTICE, II. C. 4, 5.

## I. PLEAS IN ABATEMENT.

1. An objection, that the plaintiff, as administrator *ad colligendum*, had not power to sue, should be taken by plea in abatement. *Ventress v. Smith*, 10 P. 161.... xii. 55.

2. Not executor, should be pleaded in abatement. *Childress v. Emory*, 8 W. 642.... v. 530.

3. In an action by an executor, the validity of his appointment can only be examined upon a plea in abatement. *Kane v. Paul*, 14 P. 33.... xiii. 329.

4. In an action by a corporation, if the defendant would deny the corporate existence, he must do so by a plea in abatement. *Conard v. Atlantic Ins. Co. of New York*, 1 P. 386.... vii. 637.

5. The non-joinder of a partner as a defendant in an action of assumpsit, can only be pleaded in abatement. *Barry v. Foyles*, 1 P. 311.... vii. 592.

6. The commencement of another suit for the same cause of action in the court of another State since the last continuance, cannot be pleaded in abatement of the original suit. *Renner v. Marshall*, 1 W. 215.... iii. 526.

7. If matter in abatement is pleaded *puis darrein continuance*, the judgment, if against the defendant, is peremptory. *Ib.*

## J. PLEAS PUIS DARREIN.

A plea *puis darrein*, waives the prior pleas. *Wallace v. M'Connell*, 13 P. 186.... xiii. 91.

*Supra*, I. 7.

K. DEMURRER.

1. The effect of a demurrer reaches no further back than proceedings *in fieri*. *Dickson v. Wilkinson*, 3 H. 57 . . . . xv. 287.

2. A *fi. fa.* having issued, to be levied of the assets of the testator, and been returned *nulla bona*, upon suggestion that assets had come, &c., a *scire facias* issued, and the administrator suffered a judgment by default to be levied of the goods, &c., in his hands to be administered; upon this judgment a *fi. fa.* issued and was returned *nulla bona*. Thereupon, another *scire facias* issued to have judgment *de bonis propriis*. *Held*,—that, on a demurrer taken to pleas to this last *scire facias*, the defendant could not avail himself of the want of an averment in the first *scire facias*, that goods, &c., had come to the hands of the defendant to be administered, since the original judgment. *Ib.*

BILLS, &c. G. 4; WAIVER, 1, 2.

POOR DEBTOR.

INSOLVENT LAWS, B.

POSSESSION.

A. WHAT POSSESSION GIVES TITLE TO REALTY, 375.

B. WHAT POSSESSION GIVES TITLE TO PERSONALTY, 375.

A. WHAT POSSESSION GIVES TITLE TO REALTY.

LIMITATIONS, A. 1.; SEISIN AND DISSEISIN.

Under the statute of limitations of Tennessee, of 1797, c. 43, § 4, peaceable and uninterrupted possession, claiming to hold the land adverse to the claims of all other persons, for seven years, under a grant or deed of conveyance founded upon a grant, gives a complete title to the person who has the possession *Piles v. Bouldin*, 11 W. 325 . . . . vi. 610.

B. WHAT POSSESSION GIVES TITLE TO PERSONALTY.

Five years' *bonâ fide* possession of a slave constitutes a title, by the laws of Virginia, upon which the possessor may recover in detinue; and this title may be set up by the vendee of such possessor in the courts of Tennessee, as a defence to a suit brought by a third party in those courts. *Shelby v. Guy*, 11 W. 361 . . . . vi. 621.

## POST-OFFICE DEPARTMENT.

A. RIGHTS, POWERS, DUTIES, AND LIABILITIES OF THE POSTMASTER-GENERAL, 376.

B. POSTMASTERS AND THEIR RIGHTS, DUTIES, AND LIABILITIES, 376.

C. CRIMES AND OFFENCES CONNECTED WITH THE POST-OFFICE DEPARTMENT OR ITS BUSINESS, 377.

A. RIGHTS, POWERS, DUTIES, AND LIABILITIES OF THE POSTMASTER-GENERAL.

BOND, C. 1; CONSTITUTIONAL LAW, C. 3.

If the postmaster-general has any power to make loans of the public money, such power must be limited to the exigencies of his department, occurring in its legitimate and regular operations. He cannot lawfully advance money to a clerk either by way of loan, or to purchase a depreciated certificate of deposit. *United States v. Brown*, 9 H. 487 . . . . xviii. 232.

*Infra*, C. 2.

B. POSTMASTERS AND THEIR RIGHTS, DUTIES, AND LIABILITIES.

BOND, C.; RECEIVERS AND DISBURSERS OF PUBLIC MONEY.

1. Where a postmaster relied on a payment alleged to have been made by him to a mail contractor, but had not observed the regulations of the department as to the mode of payment, the receipts to be taken, or the notices to be given to the department, and the contractor had not been charged with the alleged payment on the settlement of his account with the department. *Held*, it could not be allowed as a credit to the postmaster, in an action against him and his sureties on his official bond. *United States v. Roberts*, 9 H. 501 . . . . xviii. 244.

2. Under the 32d section of the act of March 3, 1825, (4 Stats. at Large, 112,) as well as under the instruction of the postmaster-general, a postmaster, who leaves his office in a current quarter, is liable to a double charge, if he fail to render his account for the space of one month after the expiration of the quarter. *Ib.*

3. If a deputy postmaster be in default at the end of a quarter, and he omits to make an appropriation of subsequent payments made by him, it is the right of the government to apply such payments to extinguish previous balances; and if by such appropriations all balances, occurring more than two years before the institution of the suit, were paid, the act of March 3, 1825, (4 Stats. at Large, 103, § 3,) limiting the liability of sureties, does not affect the case. *Jones v. United States*, 7 H. 681 . . . . xvii. 349.

4. A mere omission, by a postmaster, seasonably to forward a letter, is not a cause of action; some damage must be proved to have been suffered by the plaintiff. *Dunlop v. Munroe*, 7 C. 242 . . . . ii. 522.

**C. CRIMES AND OFFENCES CONNECTED WITH THE POST-OFFICE DEPARTMENT OR ITS BUSINESS.**

**CRIMINAL LAW, D.**

1. A paper, folded in the form of a letter not sealed, containing an order for merchandise, is "mailable matter," within the meaning of the 10th section of the act of March 3, 1845, (5 Stats. at Large, 736,) and the carriage of such a letter subjects the master of a steamboat running regularly on a mail route, to a penalty. *United States v. Bromley*, 12 H. 88 . . . .xix. 43.

2. An initial letter written on the envelop of a newspaper, is not a "writing or memorandum" forbidden by the 13th or 30th section of the act of March 3, 1825, (4 Stats. at Large, 105, 111,) and a postmaster is not justified thereby in detaining such newspaper from the person to whom it is directed. *Teal v. Felton*, 12 H. 284 . . . .xix. 136.

3. Trover lies in a state court for the conversion, to which such unlawful detention amounts. *Ib.*

**POWERS.**

**AGENT; CORPORATIONS, F. 2; EXECUTORS, &c. D. E.**

**A. EXISTENCE, NATURE AND EXTENT OF, AND HEREIN OF SURVIVORSHIP, 377.**

**B. THE EXECUTION OF POWERS, 379.**

**A. EXISTENCE, NATURE AND EXTENT OF, AND HEREIN OF SURVIVORSHIP.**

1. A power to dispose of lands is not an estate therein, and did not pass under an act confiscating the estates of the donees of the power. *Carver v. Jackson*, 4 P. 1 . . . .ix. 1.

2. A testator having empowered his executors, his wife to have a voice as executrix, to decide finally what was his intention, in case of dispute—*Held*, that if this power was valid, it did not enable the executors to decide contrary to the plain intent of the testator, to be judged of by a court of justice, nor to decide a question in which they or either of them was interested. *Pray v. Belt*, 1 P. 670 . . . .vii. 760.

3. A sale made under a power after the lapse of two years from the death of J. B., jun., held to be without authority, and to convey no title. *Daly v. James*, 8 W. 495 . . . .v. 494.

4. A power to A. Y., and his executors or administrators, to sell, may be executed by the executors of the executors of A. Y. *Ib.*

5. A power which constitutes A and B "to be the lawful attorney or attorneys" of the constituent, is several as well as joint. *Greenleaf's Lessee v. Birth*, 5 P. 132 . . . .ix. 252.

6. A power to "sell, dispose of, contract, and bargain for," a certain tract of land, does not authorize the attorney to relinquish it to the State for taxes

which were not a charge on the owner, but only on the land. *Clarke's Lessee v. Courtney*, 5 P. 319 . . . ix. 366.

7. The possession of the legal estate, accompanied with a power of sale, is a power coupled with an interest. *Peter v. Beverly*, 10 P. 532 . . . xii. 234.

8. Where a benefit, by way of trust, is to be conferred by the execution of a power, the power does not become extinct by the death of one of the trustees. *Ib.*

9. An imperative direction to executors to sell land, and dispose of the proceeds in a certain way, constitutes a power coupled with a trust, which survives; and in this case it was held that such a power was created over lands held by the testator in trust. *Taylor v. Benham*, 5 H. 233 . . . xvi. 377.

10. When land is directed, by will, to be sold, without declaring by whom, the executors take the power by implication, and if there are no words in the will warranting the conclusion that the testator intended a joint execution of the power, it survives. *Peter v. Beverly*, 10 P. 532 . . . xii. 234.

11. The act of Tennessee of 1801, c. 27, § 1, does enable executors, under a direction in a will to apply to the county court to sanction the manumission of slaves. *M'Cutchen v. Marshall*, 8 P. 220 . . . xi. 76.

12. When the object of a marriage settlement was declared to be the settlement of her whole estate upon a married woman, with power to dispose of it by appointment or devise, *held*, that power to appoint "the interest, rents, and profits," extended to, and gave power over, the fee of the land. *Ladd v. Ladd*, 8 H. 10 . . . xvii. 479.

13. A power which is to be executed by writing, "under her hand and seal, attested by three credible witnesses," is well executed, though the attestation clause, signed by the witnesses, only certifies to the sealing and delivery, and not to the signing. The *in testimonium* clause of the parties, which declares they signed, and evidence *aliunde* from the witnesses, may be examined to ascertain the fact that they did attest the signing. *Ib.*

14. Under a private act of the legislature of the State of New York, passed to remove obstacles in the way of executing certain trusts under a will, it was *held*, 1. That the act of the legislature divested the fee out of the trustees who had previously held it, but did not vest it in the person empowered to act in their place. 2. That the new trustee to sell had only a special power, to be exercised with the consent of the chancellor. 3. That if he exceeded this power, though with the consent of the chancellor, his act was void, the chancellor not having jurisdiction to make an order allowing an excess of power, not contemplated by the act. 4. That a sale for any thing but money was an excess of power. 5. That as the order of the chancellor required a certificate of approval of the deed by the master, and as the chancellor had not dispensed with this requirement, the deed was invalid without such certificate. 6. That the power to sell or mortgage, was not exhausted by once mortgaging the land. 7. That the grantee of the purchaser from the trustee did not obtain a valid title. *Williamson v. Berry*, 8 H. 495 . . . xvii. 669.

15. With regard to the points determined in this case, and one other point connected therewith, see the cases of *Williamson v. Irish Presbyterian Congregation*, 8 H. 565 . . . xvii. 705. *Williamson v. Ball*, 8 H. 566 . . . xvii. 706.

**B. THE EXECUTION OF POWERS.**

To the due execution of a power, a recital of, or even an express reference to it, is not necessary; the intent to execute it is matter *in pais*, to be collected from all the circumstances. *Orane v. Morris's Lessee*, 6 P. 598.... x. 274.

*Supra*, A. 18; TRUSTS, C. 11.

**PRACTICE.**

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## I. PRACTICE OF THE SUPREME COURT.

## A. PROCESS, APPEARANCE, ABATEMENT AND REVIVOR, AMENDMENT, REMITTITUR.

## 1. PROCESS. (ERROR, A.)

1. A citation not served is as no citation. *Lloyd v. Alexander*, 1 C. 365 . . . i. 426.
2. A writ of error will be quashed if not accompanied by a citation. *Ib.*
3. The original citation to the defendant in error, signed by the judge, must be returned. *Wilson v. Daniel*, 3 D. 401 . . . i. 284.
4. Rule on marshal to return writ directed to him or show cause for default, granted. *Oswald v. New York*, 2 D. 402 . . . i. 3.
5. A State having been duly served with process, and not appearing, the court, at the next term after the return term, made an order that judgment, by default, should be given against the State, unless an appearance should be entered, or cause shown, by the first day of the next term. *Ohisholm v. Georgia*. 2 D. 419 . . . i. 16.



6. Process against a State is to be served on the chief executive magistrate and the attorney-general of such State. *Grayson v. Virginia*, 3 D. 320 . . . i. 238.

7. A subpoena in equity to a State is to be served sixty days before the return day, and if the State do not appear on the return day the plaintiff may proceed *ex parte*. *Ib.*

8. Leaving a copy of a subpoena, in a suit against a State, at the house of the governor, is a sufficient service on him. *Huger v. South Carolina*, 3 D. 339 . . . i. 253.

9. Service of process on the governor, and attorney-general of a State, is sufficient service on the State. *Chisholm v. Georgia*, 2 D. 419 . . . i. 16.

10. Proclamation was made on an action against the State of New York, "That any person having authority to appear for the State of New York, is required to appear accordingly," and no person appearing, it was ordered on motion of the plaintiff's counsel, that "unless the State appeared by the first day of the next term to the suit, or showed cause to the contrary, judgment would be entered by default against the said State." *Oswald v. New York*, 2 D. 415 . . . i. 12.

11. Where a subpoena to a State was not served sixty days before the return day thereof, as required by the rules of this court, a new subpoena was awarded, returnable to the next term. *New Jersey v. New York*, 3 P. 461 . . . viii. 489.

12. In this case, the subpoena having been duly served, and the State failing to appear, a rule was entered that the complainant be at liberty to proceed *ex parte*, and that if the State, being duly served with the rule, should not appear and answer on the second day of the next January term, this court would hear the cause *ex parte*. *New Jersey v. New York*, 5 P. 284 . . . ix. 343.

13. A judgment having been recovered in the highest court of a State by the treasurer of the State, suing *ex officio*, the citation to appear to a writ of error, under the 25th section of the judiciary act of 1789, (1 Stats. at Large, 85,) should be served on the treasurer, and not on the governor and attorney-general. *Poydras de la Lande's Heirs v. Treasurer of the State of Louisiana*, 17 H. 1 . . . xxi. 333.

14. The tenth rule of this court applies only to cases in which a State is a party on the record. *Ib.*

15. On motion of the defendant, this suit was dismissed because the citation was signed by the clerk and not by a judge, pursuant to the requirement of the 22d section of the judiciary act of 1789. *United States v. Hodge*, 3 H. 534 . . . xv. 541.

CITATION, 2; ERROR, A. 1, 10-15.

## 2. APPEARANCE AND ITS EFFECTS.

1. The practice for the clerk to enter the appearance of the attorney-general, at the first term, in all cases in which the United States is a party, would not conclude the attorney-general, if he were to interpose at that term and move to strike out his appearance; but if he allows it to stand over that term it cures all defects in the form of the process. *Farrar v. United States*, 3 P. 459 . . . viii. 488.

2. If the defendant in error appears during two terms, and moves for a

*certiorari* to complete the record, he cannot afterwards object that the citation was not regular. *McDonogh v. Millaudon*, 3 H. 693 . . . xv. 604.

3. If an appellee has appeared, without a citation, and allowed the first term to pass over, and has made no motion to dismiss, it is too late to move at the second term. *Buckingham v. McLean*, 18 H. 150 . . . xix. 440.

4. An appearance of counsel only cures the want of a citation, and does not waive any other cause of dismissal; but, under peculiar circumstances, leave may be given to withdraw an appearance. *United States v. Yates*, 6 H. 605 . . . xvi. 836.

### 3. ABATEMENT, REVIVOR AND SURVIVORSHIP.

1. If the defendant below marries after the judgment, and before the service of the writ of error, the service of the citation upon the husband is sufficient. *Fairfax's Executor v. Fairfax*, 5 C. 19 . . . ii. 179.

2. By the rule of this court, if either party, in real or personal actions, die, pending the writ of error, his representatives in the personalty or realty, may voluntarily become parties, or may be compelled to become parties, in the manner prescribed by the rule. *Green v. Watkins*, 6 W. 260 . . . v. 81.

3. Upon the death of a complainant in equity, only his legal representatives can revive the suit. An assignee cannot appear. *Barribeau v. Brant*, 17 H. 43 . . . xxi. 354.

4. Under the 61st rule of this court, where the representatives of a deceased complainant and appellant did not appear after the lapse of two whole terms succeeding the suggestion of his death, the suit was entered as abated. *Ib.*

5. Where the death of the plaintiff in error was suggested and leave given to make proper parties in 1846—this not being done, at the December Term, 1850, the writ was abated, and the cause remanded. *Phillips v. Preston*, 11 H. 294 . . . xviii. 628.

6. If one defendant in error die, before the term begins, and the cause of action survives, the death may be suggested and judgment taken against the survivor. *McNutt v. Bland*, 2 H. 9 . . . xv. 1.

7. An appellee having died, on motion of the counsel of his administrator, no counsel appearing for the appellant, the appeal was dismissed. *Hook v. Linton*, 10 P. 107 . . . xii. 33.

8. If one of two plaintiffs in error die, the action survives. *M'Kinney v. Carroll*, 12 P. 66 . . . xii. 630.

### 4. AMENDMENT.

1. By consent, pleadings were amended in this court, and the cause again heard, on the amended pleadings. *Fletcher v. Peck*, 6 C. 87 . . . ii. 328.

2. This court will not allow the libel to be amended here, by the insertion of a claim of interest, so as to support the jurisdiction. *Udall v. Steamship Ohio*, 17 H. 17 . . . xxi. 344.

3. The next preceding decision applied to this case. *Obney v. Steamship Falcon*, 17 H. 19 . . . xxi. 346.

4. Though this court does not ordinarily allow amendments to be made in the record while here, this is not from want of jurisdiction; and by consent,

amendments are frequently allowed. *Kennedy v. Georgia State Bank*, 8 H. 586 . . . . xvii. 714.

5. If the necessary allegations of citizenship are not on the record, and for that cause the decree of the circuit court is reversed and the cause remanded, that court may allow an amendment inserting those allegations, but it cannot be done in this court, especially after a term has elapsed since the decree here. *Jackson v. Ashton*, 10 P. 480 . . . . xii. 203.

6. It being made to appear, by a certificate of the clerk of the circuit court, that there was a clerical error in the transcript of the record sent to and filed in this court, the error was allowed to be amended here, without returning the transcript to the circuit court, and without a *certiorari*. *Woodward v. Brown*, 13 P. 1 . . . . xiii. 1.

#### 5. REMITTITUR.

1. A *remititur* may be entered in this court, when, by accident and mistake, judgment has been taken for too large a sum, and the record shows the precise extent of the error. *Bank of the Commonwealth of Kentucky v. Ashley*, 2 P. 327 . . . . viii. 127.

2. In such a case the judgment of the circuit court is affirmed, with a deduction of the amount remitted, and without costs in error. *Ib.*

### B. TRANSCRIPTS OF THE RECORD AND FILING THE SAME; EVIDENCE, AND OBJECTIONS THERETO; TIME, RULES, AND DISMISSING APPEALS; WRITS OF ERROR AND CERTIFICATES OF DIVISION.

FOR CERTIORARI, *see* THAT TITLE.

#### 1. TRANSCRIPTS OF THE RECORD AND FILING THE SAME.

1. Where a writ of error has been taken out by the plaintiff, a rule on him to file the transcript of the record will not be granted. *Boyd v. Scott*, 11 H. 292 . . . . xviii. 628.

2. Where the only certificate by the clerk, in verification of the record below, was: "Copy. Teste, W. M., clerk," it was held that the verification was insufficient. *Wilson v. Daniel*, 3 D. 401 . . . . i. 284.

#### 2. EVIDENCE, AND OBJECTIONS THERETO. (EVIDENCE, C. 2.)

1. By consent of parties, this court examined a deed not put in evidence in the circuit court, in a suit in equity. *Boone v. Chiles*, 10 P. 177 . . . . xii. 68.

2. Where no question concerning the authenticity of title-papers was made in the court below, and they were introduced without objection, proof of their authenticity cannot be required in this court. *United States v. Delespine*, 15 P. 319 . . . . xiv. 100.

3. The act of March 3, 1803, § 2, (2 Stats. at Large, 244,) prohibits this court from receiving new evidence on an appeal in an equity cause. *Russell v. Southard*, 12 H. 139 . . . . xix. 66.

4. Where an inspection and comparison of original documents is material to the decision of a prize cause, this court will order the original papers to be sent up from the court below. *The Elsinour*, 1 W. 439 . . . .iii. 626.

5. Testimony, by depositions, can be regularly taken for this court only under a commission issuing according to its rules. *The Argo*, 2 W. 287 . . . .iv. 109.

6. In appeals to this court, from the circuit courts, in chancery cases, the parol testimony which is heard at the trial, in the court below, ought to appear in the record. *Conn v. Penn*, 5 W. 424 . . . .iv. 690.

7. A certificate, by the clerk of the circuit court, upon a deposition, that it was filed after the trial, controls the fact that it is found on the record, shows that it formed no part of the cause in the circuit court, and opens it to every exception, as if offered here for the first time. *The Samuel*, 1 W. 9 . . . .iii. 447.

#### 8. TIME-RULES, AND DISMISSING APPEALS, AND WRITS OF ERROR AND CERTIFICATES OF DIVISION.

1. A rule having been obtained by defendant in error, at the opening of the court, that the plaintiffs appear and prosecute their writ of error within the term, or suffer a *non pros.*, and it being found that errors had been assigned in the court below, and a joinder in error entered here, the rule was changed to the following: "That unless the plaintiff in error appear and argue the errors to-morrow, a *non pros.* be entered. The plaintiffs not appearing, a *non pros.* was entered according to the rule. *Hazlehurst v. United States*, 4 D. 6 . . . .i. 310.

2. If the plaintiff in error does not appear, the defendant may either have the plaintiff called, and dismiss the writ of error, with costs, or he may open the record and go for an affirmance. *Montalet v. Murray*, 3 C. 248 . . . .i. 570.

3. If the counsel on neither side appear when the cause is called, the writ of error will be dismissed. *Radford v. Craig*, 5 C. 289 . . . .ii. 267.

4. An equity suit, where an appeal has been taken from the circuit court to this court but not prosecuted, will be dismissed upon producing a certificate from the court below to that effect. *Randolph v. Barbour*, 6 W. 128 . . . .v. 35.

5. An admiralty suit, where an appeal has been taken from the circuit court to this court, but not prosecuted, will be dismissed, upon producing a certificate from the court below, that the appeal has been taken, and not prosecuted. *The Jonquille*, 6 W. 452 . . . .v. 121.

6. The bar of a writ of error by the statute of limitations, may be taken advantage of in this court on motion. *Brooks v. Norris*, 11 H. 204 . . . .xviii. 597.

7. The fifty-fourth rule does not apply to cases docketed at an adjourned term. *Larman v. Tisdale's Heirs*, 11 H. 586 . . . .xviii. 724.

8. As the appellant, whose appeal has not been dismissed for not filing a transcript of the record, has the whole term to file it and move to reinstate the cause, the clerk cannot give a certificate of the dismissal during the term. *Bank of the United States v. Swan*, 3 P. 68 . . . .viii. 288.

9. A certificate of the clerk of the circuit court, that a final judgment has been rendered in a cause entitled: "Robert Holliday *et al.* v. Joseph Batson *et al.*"—not giving the names of the other parties, does not state the title of the case with sufficient certainty, and a cause will not be docketed and dismissed under the 43d rule on such a certificate. *Holliday v. Batson*, 4 H. 645 . . . .xvi. 225.

10. A cause cannot be docketed and dismissed under the 43d rule of this court upon a certificate of the clerk of the court below, which does not name every individual who was a party to the record. *Smith v. Clark*, 12 H. 21 . . . .xix. 13.

11. A *nol. pros.* having been entered in the circuit court, a writ of error thereto was dismissed on motion of the attorney-general. *United States v. Phillips*, 6 P. 776 . . . .x. 375.

12. If the defendant in error fail to move to docket and dismiss a cause, until after the record has been filed, the writ of error will not be dismissed. *Pickett's Heirs v. Legerwood*, 7 P. 144 . . . .x. 433.

13. A judgment of dismissal under the 43d rule of this court, is *nisi* only, during the term, and in the exercise of a sound discretion the court may, and unless injurious to some substantial right of the defendant, will reinstate the case. *Gwin v. Breedlove*, 15 P. 284 . . . .xiv. 90.

14. Under the 43d rule of this court, the production of the original writ of error and citation, is sufficient, without a certificate of the clerk of the court below, to entitle the defendant to have the case docketed and dismissed. *Amis v. Pearle*, 15 P. 211 . . . .xiv. 71.

15. To docket and dismiss a cause under the 43d rule of this court, the certificate of the clerk of the court below must show that its judgment or decree was rendered thirty days before the first day of the next term of this court. *Rhodes v. Steamship Galveston*, 10 H. 144 . . . .xviii. 327.

16. If the decree appealed from was rendered within thirty days of the commencement of the next term of this court, the 43d rule does not require the transcript of the record to be filed within the first six days of the term. *United States v. Boisdoré's Heirs*, 7 H. 658 . . . .xvii. 336.

17. Where a motion to docket a cause was made at the next term after the return term of the writ of error, and simultaneously a motion to docket and dismiss it, the court allowed the former motion. *Owings v. Tiernan's Lessee*, 10 P. 24 . . . .xii. 7.

18. Though a transcript of the record below has been lodged with the clerk by the plaintiff in error, the defendant cannot have the cause docketed and dismissed without producing the certificate of the clerk of the court below, as required by the rule. *Macomb v. Armstead*, 10 P. 407 . . . .xii. 177.

19. The plaintiff lodged with the clerk of the court a transcript of the record, and requested him to docket the cause. The clerk declined, because no fee bond had been filed. The court refused to allow the cause to be docketed without a bond, but gave time to the plaintiff to file one. In default whereof, the cause was to be docketed and dismissed, on motion of the defendant. *Owings v. Tiernan's Lessee*, 10 P. 447 . . . .xii. 193.

20. The defendant cannot have a case docketed and dismissed without producing the certificate of the clerk below, though a transcript of the record has

been lodged with the clerk here by the appellant. *West v. Brashear*, 12 P. 101 . . . .xii. 654.

21. Where questions have been sent to this court on a division of opinion, under the 6th section of the act of April 29, 1802, (2 Stats. at Large, 159,) and the plaintiff has, in writing, during the vacation, requested the clerk of the circuit court to enter a discontinuance, and has given notice thereof to the defendant, this court will permit the plaintiff to have the cause dismissed from this court. *Veazie v. Wadleigh*, 11 P. 55 . . . .xii. 384.

22. The rule to dismiss a writ of error for not filing the transcript of the record within the first six days of the term, does not apply to cases where the transcript shall have been filed before the motion to dismiss. *Bingham v. Morris*, 7 C. 99 . . . .ii. 469.

### C. CONTINUANCES AND HEARINGS. (FEIGNED SUIT.)

1. Motion to assign a time for argument refused. *Barry v. Mercein*, 4 H. 574 . . . .xvi. 203.

2. This court does not consider a point open for discussion which has been once deliberately decided. *United States v. Four Hundred and Twenty-two Casks of Wine*, 1 P. 547 . . . .vii. 691.

3. Where the principles governing a patent cause had been settled by this court, they declined to hear an argument on technical questions of pleading, arising in another case, under the same patent, and certified to this court by the judges of a circuit court. *Smith v. Ely*, 15 H. 137 . . . .xx. 443.

4. Reasons why these cases were held under advisement. *Soulard v. United States*, 4 P. 511 . . . .ix. 169.

5. If the counsel for the appellant neglect to furnish the court with a statement of the points of the case, the appeal will be dismissed. *Schooner Catherine v. United States*, 7 C. 99 . . . .ii. 468.

6. This court will not compel a hearing, unless the citation be served thirty days before the first day of the term. *Welsh v. Mandeville*, 5 C. 321 . . . .ii. 281.

7. The death of the only counsel of a party, so recently before the term, that sufficient time to employ other counsel and have the case prepared for argument had not elapsed when the term began, is cause for continuing a case of magnitude and difficulty. *Hunter v. Fairfax's Devisee*, 3 D. 305 . . . .i. 233.

8. Cause continued on the ground that counsel, relied on to close the argument, had recently become too ill to attend, and there was not time to employ and instruct other counsel. *Rhode Island v. Massachusetts*, 11 P. 226 . . . .xii. 407.

### D. REHEARINGS AND REINSTATING CAUSES.

1. This court will not rehear a cause after the term in which it was decided. *Hudson v. Guestier*, 7 C. 1 . . . .ii. 431.

2. The court being composed of seven judges, and two of the seven being absent, and four not being able to concur in opinion, and questions of constitutional law involved, a reargument was directed. *Briscoe v. Commonwealth Bank of the State of Kentucky; New York v. Miln*, 8 P. 118 . . . .xi. 43.



3. No reargument will be heard by this court in any case in which a decision has been made, unless some member of the court, who concurred in the judgment, desires it, and then it will be ordered without waiting for the application of counsel. And this rule applies to cases where the court was equally divided. *Brown v. Aspden*, 14 H. 25....xx. 14.

4. This court will not grant a rehearing in an equity cause, after it has been remitted to the court below to carry into effect the decree of this court, and a subsequent appeal brings up only the proceedings after the mandate. *Browder v. M'Arthur*, 7 W. 58....v. 220.

5. Where a case involved the construction of a treaty, the court heard a third argument on the application of the executive government of the United States. *The Amiable Isabella*, 6 W. 1....v. 1.

6. A writ of error to the court of appeals of the territory of Florida, having been docketed and dismissed, *Held*, 1. That notwithstanding the admission of Florida into the Union, as a State, the clerk of that court had power to certify the record. 2. That, under the special circumstances, it was proper to restore the cause to the docket. *Bradford v. Williams*, 4 H. 576....xvi. 205.

JUDGMENTS, &c. A. 1-9, 12.

## E. JUDGMENTS AND DECREES, REMANDING CAUSES, MANDATES AND THEIR EFFECTS IN COURTS BELOW.

### 1. JUDGMENTS AND DECREES.

1. Where the court is equally divided in opinion upon a writ of error, the judgment of the court below is to be affirmed. *Etting v. Bank of the United States*, 11 W. 59....vi. 511.

2. A judgment of the last term and the mandate thereon, not having included interest, pursuant to the rule of this court, it was held to be a clerical error, and directed to be amended at this term, the mandate not having been presented to the court below. *Bank of the Commonwealth of Kentucky v. Wistar*, 3 P. 431....viii. 473.

3. The plaintiff having died during this term, while the case was held under advisement, judgment was entered as of the first day of the term, *nunc pro tunc*. *Clay v. Smith*, 3 P. 411....viii. 466.

APPEAL, E. 12; JUDGMENTS, &c. A. 1-9, 12.

### 2. REMANDING CAUSES. (ADMIRALTY, B. 1; EVIDENCE, G. 2.)

1. Though a case has been attempted to be brought here by appeal, when there was no appellee in existence at the time the appeal was claimed, it may be remanded with directions to make the proper parties. *Taylor v. Savage*, 1 H. 282....xiv. 610.

2. If this court find a case has merits, but no decree can be made for want of a necessary party, the cause will be remanded to have such party made. *Lewis v. Darling*, 16 H. 1....xxi. 1.

3. The court, finding that a certain contract referred to in the bill and an



swer, but not exhibited, might have an important effect on the decree, reversed the decree of the court below, and remanded the cause, that it might be made an exhibit. *Levy v. Arredondo*, 12 P. 218....xii. 700.

4. In a bill for an account and distribution of the property of a testator, one question being what was the meaning of the words "heir at law," it is necessary to aver where the testator's domicile was at the times when he made the will, and when he died; and as there was no such averment, the cause was remanded to the circuit court, with directions to allow an amendment to that effect, and also to let in new parties. *Harrison v. Nixon*, 9 P. 483....xi. 442.

5. If a libel is not a sufficient basis for a decree, and the proofs show cause for condemnation, the case is remanded to the circuit court with directions to allow an amendment. *The Palmyra*, 12 W. 1....vii. 1.

6. Upon a reversal for a defect in pleading, the case is remanded to the circuit court for further proceedings; and there the pleadings may be amended. *Garland v. Davis*, 4 H. 181....xvi. 51.

7. If the circuit court has dismissed the bill for want of jurisdiction, and the decree is reversed, this court will not hear the merits, but remand the cause. *M'Donald v. Smalley*, 1 P. 620....vii. 732.

8. After a cause is remanded to the inferior court, such court may receive additional pleas, or admit amendments to those already filed, even after the appellate court has decided such pleas to be bad upon demurrer. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 C. 206....ii. 373.

9. Where the complainant was entitled to an account in the court below, but did not apply for it, resting his case on another ground, not tenable, this court will remand the cause to have such account taken. *Finley v. Lynn*, 6 C. 238....ii. 386.

9a. It is too late to question the jurisdiction of the circuit court after the cause has been sent back by mandate. *Skilern's Executors v. May's Executors*, 6 C. 267....ii. 396.

10. If a sentence of forfeiture be reversed for a defective libel, the cause will be remanded to the circuit court, with directions to allow an amendment. *Brig Caroline v. United States*, 7 C. 496....ii. 641.

11. In prize causes this court has an appellate jurisdiction only, and a claim cannot for the first time be interposed here; but where the court below had proceeded to adjudication before the above period had elapsed, the cause was remanded to that court, with directions to allow a claim to be filed therein, and the libel to be amended, &c. *The Harrison*, 1 W. 298....iii. 559.

12. A majority of the court being of opinion that the judgment below was erroneous, but being equally divided whether the court below had jurisdiction, the judgment was reversed, but no *venire facias de novo* was awarded. *Bingham v. Cabbot*, 3 D. 19....i. 76.

13. This court will not allow a new claim to be interposed here, but will remand the cause to the circuit court, where it may be presented. *The Societe*, 9 C. 209....iii. 337.

14. When merits plainly appear, it is the settled practice of this court, in admiralty, to allow a new allegation to be filed, and for this purpose to remand the cause to the circuit court. *The Schooner Adeline and Cargo*, 9 C. 244....iii. 350.

15. Where the evidence is sufficient to show a breach of the law, but the information is not sufficiently certain to authorize a decree, this court will remand the cause to the circuit court, with directions to allow the information to be amended. *The Edward*, 1 W. 261 . . . .iii. 540.

16. The decrees of the circuit court in these cases were reversed for want of a bill; but these cases appearing to have been conducted in the confidence that the pleadings in another case could be introduced into these cases, they were remanded to the circuit court, with directions to allow bills to be filed, and to proceed thereon according to law. *Mandeville v. Burt*, 8 P. 256 . . . .xi. 90.

17. A case not being properly prepared in the circuit court for a hearing, a material fact of domicile of an alleged testator, and also the existence and contents of another supposed will, not being put in issue, the decree was reversed, and the cause remanded, with liberty to the plaintiff to amend his bill. *Estho v. Lear*, 7 P. 130 . . . .x. 426.

18. A decree was reversed, and the case remanded, because a complex account had not been referred to a master. The court would not examine it. *Dubourg de St. Colombe's Heirs v. United States*, 7 P. 625 . . . .x. 602.

19. When the judgment of the circuit court, against a party demurring, is affirmed, this court will not instruct the circuit court to allow him to withdraw his demurrer. *United States v. Tingey*, 5 P. 115 . . . .ix. 248.

### 3. MANDATES AND THEIR EFFECTS. (JUDGMENTS, &c. A.)

1. An equity cause having been heard in this court on appeal, and its merits finally decided, and a mandate sent to the court below requiring it to execute the decree of this court, the court below rightly refused to permit the defendant to bring upon the record facts showing that the suit was abated before the appeal, and that the executor of the complainant ought not to have been allowed to prosecute the appeal to this court. *Ex parte Story*, 12 P. 339 . . . .xii. 740.

2. Examination of the manner in which a circuit court had executed a mandate of this court. *Walden v. Bodley's Heirs*, 9 H. 34 . . . .xviii. 15.

3. The mandate of the supreme court to the circuit court, must be its guide in executing the judgment or decree on which it issued. *West v. Brashear*, 14 P. 51 . . . .xiii. 341.

4. When that court may look out of the mandate for a guide. *Ib.*

5. This court having made a decree, affirming a decree of the court below for a specific tract of land, ascertained by a survey made under the order of the court below, under the act of 1824, (4 Stats. at Large, 52,) applied to Florida titles by the act of May 23, 1828, § 6, (4 Stats. at Large, 285,) the latter court could not, on petition, correct any alleged mistake in that survey. *Chaires v. United States*, 3 H. 611 . . . .xv. 565.

6. On an appeal from a decree of the court below, by which a mandate of this court was construed and applied, this court will examine the mandate and the proceedings upon which it was founded, and determine whether it has been correctly construed. *Mitchel v. United States*, 15 P. 52 . . . .xiv. 24.

7. The mandate in *Mitchel v. The United States*, 9 P. 711, thus examined, and its construction by the court below found correct. *Ib.*

8. If a mandate did not conform to the decree, and provide for its entire and correct execution, a new mandate will be issued, on petition at a subsequent term. *Sibbald v. United States*, 12 P. 488....xii. 811.

9. An award of a *venire facias de novo*, by this court, is an order for a new trial, and is never equivalent to a new suit. *United States v. Hawkins's Heirs*, 10 P. 125....xii. 40.

10. This court will not dismiss an appeal because the circuit court exceeded its powers in acting under a mandate from this court. *Canter v. American and Ocean Ins. Co.* 2 P. 554....viii. 209.

11. Upon a writ of error to the court for the correction of errors for the State of New York, its judgment was reversed by this court, and a mandate sent to proceed according to the opinion of this court. The court of errors thereupon entered a reversal of its judgment, and declared that only an error in fact being assigned, which they had no jurisdiction to try, the writ of error out of that court must be, and the same was dismissed. *Held*, that the mandate was not disobeyed. *Davis v. Packard*, 8 P. 312....xi. 113.

12. Though the highest court of a State to which a writ of error goes from this court, cannot reëxamine a reversal or affirmance here, and though the judgment of this court, that the judgment of the state court be reversed, does, *ipso facto*, reverse it, yet if the mandate does not direct any mode of proceeding thereon, the state court must judge of its own jurisdiction, and proceed accordingly. *Ib.*

13. The judgment of the high court of appeals of Maryland being reversed, and that of the general court affirmed, the mandate for execution goes to the general court, and costs in both the Maryland courts are allowed. *Clerke v. Harwood*, 3 D. 342....i. 253.

14. A decree of a circuit court, allowing interest under a former decree of this court in the cause, reversed. *Potter v. Gardner*, 5 P. 718....ix. 540.

APPEAL, D. 6; COSTS, A. 6, 7; INTEREST, A. 6.

## F. SUPERSEDEAS AND EXECUTION.

1. This court, in the exercise of its appellate power, cannot issue a *supersedeas* to stay proceedings on a judgment of an inferior court, unless the writ of error was sued out within ten days, in conformity with the 23d section of the judiciary act of 1789. *Hogan v. Ross*, 11 H. 294....xviii. 629.

2. This court will not quash an execution issued by the court below to enforce its decree pending the writ of error, if the writ of error be not a *supersedeas* as to the decree. *Wallen v. Williams*, 7 C. 278....ii. 528.

3. If an execution has been issued by the circuit court, in the case brought here by writ of error, where the plaintiff in error was entitled to a *supersedeas*, this court will issue a writ of *supersedeas*. *Stockton v. Bishop*, 2 H. 74....xv. 38.

ERROR, C. 4; SUPERSEDEAS, 3.

## II. PRACTICE IN OTHER COURTS.

## A. PROCESS.

## 1. SEE LAWS OF THE SEVERAL STATES, A.

## JURISDICTION, F.

## 2. WHERE PROCESS RUNS.

## JURISDICTION, F.

The circuit court has jurisdiction in a suit in equity, to stay proceedings upon a judgment at law between the same parties, although the subpoena be served upon the defendant, out of the district in which the court sits. *Logan v. Patrick*, 5 C. 288 . . . ii. 266.

## 3. SERVICE AND RETURN.

Under the act of July 11, 1798, (1 Stats. at Large, 594,) a judgment by default taken on a collector's bond, the writ not having been served fourteen days before the return day thereof, is erroneous. *Dobynes v. United States*, 3 C. 241 . . . i. 567.

## 4. FORM OF PROCESS.

COURTS OF THE UNITED STATES, B. b ; LAWS OF THE SEVERAL STATES, A.

## 5. DEFECTS OF, HOW CURED, AND HEREIN OF APPEARANCE.

1. An appearance by attorney cures an irregularity in not directing the writ to and having it served by a proper officer. *Knox v. Summers*, 3 C. 496 . . . i. 649.

2. If the defendant in a foreign attachment appears, he places himself on the same ground as if he had been personally served with process. *Pollard v. Dwight*, 4 C. 421 . . . ii. 158.

3. A resident in another district, by an appearance, generally, in a cause, waives his privilege not to be sued out of the district where he resides, or is found. *Taylor v. Longworth*, 14 P. 172 . . . xiii. 414.

4. If a party appears upon a process of foreign attachment, he thereby waives the privilege he was entitled to, of not being sued out of the district where he resided or was found. *Irvine v. Lowry*, 14 P. 298 . . . xiii. 467.

5. Where the defendant appears, without taking the exception, it is an admission of the regularity of the service. *Gracie v. Palmer*, 8 W. 699 . . . v. 547

## B. ABATEMENT AND REVIVOR.

1. In Virginia, if the marshal return on an *alias capias* that one defendant is not an inhabitant the suit abates as to him. *Barton v. Petit*, 7 C. 194.... ii. 510.

2. The 31st section of the judiciary act, does not enable the demandant in a real action to prosecute it against the heir of the tenant who dies before judgment, and the suit abates. *Macker's Heirs v. Thomas*, 7 W. 530.... v. 314.

3. If judgment is rendered against the heir, he may reverse it by a writ of error, though he did not assign for error in the court below, that the suit was abated. *Ib.*

4. Under the 31st section of the judiciary act, an executor may come in, voluntarily, to prosecute, and the defendant is not thereby entitled to delay; and after the order for his admission has been made, it is too late to contest the fact that he is executor. *Wilson v. Codman's Executor*, 3 C. 193.... i. 556.

5. A. L. brought an action of assumpsit in the circuit court, and after issue joined, the plaintiff died, and the suit was revived by *scire facias*, in the name of his administratrix. While the suit was still depending, the administratrix intermarried with F. A., which marriage was pleaded *puis darrein continuance*. Held that this *scire facias* was no bar to a new *scire facias*, to revive the original suit in the name of F. A. and wife, as the personal representative of A. L., in order to enable her to prosecute the suit until a final judgment, under the judiciary act of 1789, c. 20, § 31. *M'Coul v. Lekamp's Administratrix*, 2 W. 111....iv. 49.

## C. FILING AND OTHER ACTS AND ORDERS RESPECTING PLEADINGS.

1. The allowance of double pleading is not a matter of absolute right, and a writ of *mandamus* will not be issued, to compel an inferior court to permit more than one plea to be filed. *Ex parte Davenport*, 6 P. 661....x. 302.

2. After a judgment for want of a plea, it has been the practice in Virginia to allow any special plea to the merits to be filed at the next term, but at any subsequent term it was a matter of mere discretion whether to grant the leave. *Resler v. Shehee*, 1 C. 110....i. 361.

3. Objections, that a plea is not properly entitled, or not duly verified by affidavit, go to the reception of the plea, but are not grounds of special demurrer, after it is received. *Commercial and Railroad Bank of Vicksburg v. Slocumb*, 14 P. 60....xiii. 346.

4. A plea that all the promisees are not joined, filed after the trial was begun, by leave of court, may be stricken out by its subsequent order. *Breedlove v. Nicolet*, 7 P. 413....x. 527.

5. An averment that the plaintiffs are aliens, not traversed, is confessed. *Ib.*

## D. AMENDMENTS.

1. When a new count is filed, the defendant has a right to plead *de novo*; but if he goes to trial on the old plea, which puts the whole declaration in issue, there is no error. *Wright v. Hollingsworth's Lessees*, 1 P. 165....vii. 515.

2. Leave to amend was properly refused by the circuit court, at the hearing, as the proposed amendment would have presented a new case. *Snead v. M<sup>r</sup> Coull*, 12 H. 407....xix. 208.

3. At the term when a verdict was rendered, a motion was made in arrest of judgment, for a misjoinder of counts, and the judgment was ordered to be arrested, but no formal judgment, that the plaintiff take nothing by his writ *non obstante veredicto*, was entered. At the second term following, the court, on motion, set aside the order arresting the judgment, allowed a *nolle prosequi* to be entered on one count to cure the misjoinder, and ordered the verdict to be entered on the other count, to which it appeared the evidence was applicable, and entered a judgment *nunc pro tunc* for the plaintiff. *Held*, 1. That this amendment of the verdict and of the record was within the power of the court under the statute of jeofails, the 32d section of the judiciary act of 1789, (1 Stats. at Large, 91,) and, being an exercise of the discretion of the court below, it could not be revised by a writ of error. *Matheson's Administrators v. Grant's Administrator*, 2 H. 263....xv. 114.

4. It is not error to allow an amendment of the date of the demise, in a declaration in ejectment. *Blackwell v. Patton*, 7 C. 471....ii. 626.

5. Under the 32d section of the judiciary act, the court may, after a plea in abatement, allow a summons and declaration to be amended, by striking out "administrator, &c.," and inserting "executor, &c." *Randolph v. Barrett*, 16 P. 138....xiv. 216.

6. There is no fixed time within which verdicts and judgments may be amended; even after error brought, if within a reasonable time, such amendments may be allowed, and it is a salutary practice thus to cure mere formal defects. *Matheson's Administrators v. Grant's Administrator*, 2 H. 263....xv. 114

## EJECTMENT, B. 5.

## E. JEOFAILS.

1. On a writ of error, the declaration, plea, and finding must be taken together; and if from these it appears that the judgment is according to the right of the cause and matter in law, then all defects of form are to be disregarded, and the judgment must stand, as required by the 32d section of the judiciary act of 1789. *Stockton v. Bishop*, 4 H. 155....xvi. 65.

2. A mistake in the entry of the judgment, as to the name of the defendant, being rightly named elsewhere on the record, and in the judgment called "the defendant," is cured by the statute of jeofails. (1 Stats. at Large, 91, § 32.) *Conrad v. Griffey*, 11 H. 480....xviii. 691.

3. A verdict and judgment upon one demise, no notice being taken of the issues on the other, will not be reversed; it is a formal defect, and cured by the 32d section of the judiciary act. *Van Ness v. Bank of the United States*, 13 P. 17....xiii. 10.

4. The statute of jeofails, the 32d section of the judiciary act, embraces verdicts, defective in point of form, but substantially sufficient to enable the court to perceive the right of the case. *Roach v. Hulings*, 16 P. 319....xiv. 317.

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JUDGMENTS, &c. D. 6; VERDIOT, 9.

F. BILLS OF PARTICULARS. (See THAT TITLE)

*Supra*, II. D.

G. TRIAL.

CRIMINAL PROCEDURE, C.; JURISDICTION, A. d. 4.

1. DEMURRER TO EVIDENCE.

1. A demurrer to evidence must be joined, otherwise no judgment can be rendered on it. *Fowle v. Common Council of Alexandria*, 11 W. 820....vi. 608.

2. Such a demurrer is not proper to bring before the court evidence on both sides, tending to prove and disprove certain facts; and a judgment thereon is erroneous. *Ib.*

3. On a demurrer to evidence every thing which the jury could reasonably infer from the evidence, is to be considered as admitted. *Bank of the United States v. Smith*, 11 W. 171....vi. 547.

4. On a demurrer to evidence, judgment will be given against the party demurring, if upon the evidence it would have been competent for a jury to have found a verdict against him, though the court may, on the whole, be of opinion that a verdict in his favor would have been more satisfactory. *Pauling v. United States*, 4 C. 219....ii. 81.

5. It is a matter of discretion with a court whether it will compel a party to join in a demurrer to evidence. *Young v. Black*, 7 C. 565....ii. 669.

6. A demurrer to evidence ought not to be allowed where the party demurring refuses to admit the facts which the other side attempts to prove, nor where he offers contradictory evidence, or attempts to establish inconsistent propositions. *Ib.*

7. If upon any view of the facts, and making any inferences warranted by law from the evidence, the jury could have given a verdict against the party demurring to evidence, the court is at liberty to give judgment against him. *Thornton v. Bank of Washington*, 3 P. 86....viii. 273.

8. The judgment must be against a party demurring to evidence, if any fair construction of the evidence will justify it. *Olinoweth v. Haskell's Lessee*, 3 P. 92....viii. 301.



## 2. NONSUIT.

A circuit court of the United States has not power to order a peremptory nonsuit against the will of the plaintiff. He has a right to have his case submitted to a jury. *Elmore v. Grymes*, 1 P. 469 . . . .vii. 668. *D'Wolf v. Rabaud*, 1 P. 476 . . . .vii. 672. *Crane v. Morris's Lessee*, 6 P. 59 . . . .x. 274.

## 3. ORDER OF PROCEEDINGS.

1. The order in which proof shall be exhibited, is matter of discretion of the court, rather than of strict right. *Wood v. United States*, 16 P. 842 . . . .xiv. 836.

2. The order of introducing evidence, and the times when it may be introduced, are matters of practice, within the discretion of the circuit court, and upon a writ of error this court will not revise its decision. *Philadelphia and Trenton Railroad Co. v. Stimpson*, 14 P. 448 . . . .xiii. 588.

3. An agreement, purporting to be made by an agent, may be proved, before giving evidence of the authority of the agent. *Bank of the Metropolis v. Guttschlick*, 14 P. 19 . . . .xiii. 822.

4. The act incorporating the Bank of Alexandria, provided that, in suits brought by the bank upon notes made negotiable therein, an issue should be made up and the trial had at the return term of the writ. The appearance day in Virginia for all process was the day after the term. *Held*, that in such a suit the court below might rule the defendant below to a trial at the return term. *Young v. Bank of Alexandria*, 5 C. 45 . . . .ii. 188.

5. A party has no right to cross-examine a witness except as to facts and circumstances connected with the matters stated in his direct examination. *Philadelphia and Trenton Railroad Co. v. Stimpson*, 14 P. 448 . . . .xiii. 588.

## 4. CHARGE AND INSTRUCTIONS.

## EXCEPTIONS, A.; ERROR, I.

1. Where a witness states facts, and his inferences, it is proper to instruct the jury that they must determine from the facts whether the inferences are correct. *Walker v. Bank of Washington*, 3 H. 62 . . . .xv. 289.

2. The court cannot give an instruction which makes the case turn on one point only, when there are other grounds necessary to be passed upon by the jury; nor one which assumes as true a controverted fact. *Adams v. Roberts*, 2 H. 486 . . . .xv. 187.

3. A refusal to give an instruction not applicable to the evidence, is not error. *Rhett v. Poe*, 2 H. 457 . . . .xv. 167.

4. An instruction that a deposition should be favorably considered by the jury, they being also told that it is their province to judge of its effect, and that they are not bound by the view the court have taken of it, is not erroneous. *Garrard v. Reynold's Lessee*, 4 H. 128 . . . .xvi. 44.

5. An instruction calculated to mislead a jury, is erroneous. *Caldwell v. United States*, 8 H. 366 . . . .xvii. 625.

6. It is not error for the circuit court to refuse to give an instruction con-

cerning the legal effect of facts, of which there is no proof. *Clarke v. Kowm-lar*, 10 P. 657 . . . . xii. 289.

7. It is the duty of a party asking an instruction to use language having a definite legal meaning. *Winn v. Patterson*, 9 P. 668 . . . . xi. 516.

8. Where there is no dispute concerning the facts, it is not error for the court to instruct the jury that the evidence does not warrant a verdict for the plaintiff, if such be the law upon those facts. *Toland v. Sprague*, 12 P. 300 . . . . xii. 729.

9. An instruction that only nominal damages are to be given is erroneous, if there was evidence which the jury had a right to weigh, tending to prove actual damages. *Tracy v. Swartwout*, 10 P. 80 . . . . xii. 26.

10. An instruction upon a question which does not arise out of any evidence should be refused. *Tucker v. Moreland*, 10 P. 58 . . . . xii. 14.

11. A positive direction to a jury that a party is not entitled to a credit cannot be given, if there is any evidence to be weighed by the jury. *United States v. Laub*, 12 P. 1 . . . . xii. 604.

12. A prayer that the jury may be instructed "that it is competent for them to infer from the evidence, &c.," is ambiguous and improper. *United States v. Jones*, 8 P. 399 . . . . xi. 140.

#### JURY, A. 7.

#### 5. VERDICT.

See THAT TITLE.

#### 6. JUDGMENT AND EXECUTION.

See THOSE TITLES.

#### 7. STATEMENT OF FACTS AND OTHER MATTERS.

1. Upon a statement of facts, the court cannot infer a substantive fact, not agreed, though a jury might be warranted, under the circumstances, in finding that fact. *Binney's Lessee v. Chesapeake and Ohio Canal Co.* 8 P. 214 . . . . xi. 73.

2. A writ of error will lie upon a judgment entered on an agreed state of facts, signed by the counsel, and entered on the record of the court below. *United States v. Eliason*, 16 P. 291 . . . . xiv. 304.

#### H. DEFAULT, NOLLE PROSEQUI, DISCONTINUANCE, JUDGMENT FOR WANT OF PLEA.

*Supra*, II. A. 3.

1. Under the practice of the courts of Rhode Island, as adopted by the judiciary act, the entry of a default, after a plea of the general issue, no *similiter* being on the record, does not operate a discontinuance, and a judgment on the default is valid. *Brown v. Van Braam*, 3 D. 344 . . . . i. 254.

2. Under the same practice, the court may assess the damages in an action of assumpsit on a foreign bill payable in pounds sterling. *Ib.*

3. An action having been brought against the drawers and indorser of a bill

jointly, under a law of Mississippi adopted by a rule of the district court of the United States. *Held*, that the court could grant leave to enter a *nol. pros.* against the drawers, the indorser having pleaded severally. *McAfee v. Doremus*, 5 H. 53 . . . .xvi. 300.

4. The question, whether a *noll. pros.* may be entered against one or more defendants, in an action on a joint and several bond, is a matter of practice, to be decided upon considerations of policy and convenience. *Minor v. Mechanics' Bank of Alexandria*, 1 P. 46 . . . .vii. 445.

5. The defendants having severed in their pleadings, and no right to contribution being affected, a *nol. pros.* entered after judgment against the sureties, as to the principal obligor, was held regular. *Ib.*

6. In Mississippi, suits on written promises of copartners, may be brought against one or more of them, and if three are sued, and one pleads and two are defaulted, the plaintiff may discontinue against the one who defends, and take a judgment by default against the others. *Amis v. Smith*, 16 P. 303 . . . .xiv. 311.

7. If the plaintiff discontinue as to one count, the rights of the parties under the other counts are unaffected. *Hughes v. Moore*, 7 C. 176 . . . .ii. 506.

8. A judgment by default in an action of debt upon promissory notes, is final, and the lien of the judgment attaches upon its rendition. *Clements v. Berry*, 11 H. 398 . . . .xviii. 660.

9. Where the regular term began on the 3d Monday in April, and the court continued to sit, *de die in diem*, until the 16th of May, when it adjourned to the 4th Monday of June; *held*, that a defendant, against whom an office judgment had been entered on the 16th of May, had a right, under the laws and practice of Virginia, to appear at the adjourned session, and have the default set aside, on giving special bail, and pleading issuably. *Mechanics' Bank of Alexandria v. Withers*, 6 W. 106 . . . .v. 24.

10. As, by the law of Mississippi, a joint promise on negotiable paper, makes a several as well as a joint liability to action, the plaintiff, in an action against two or more jointly, may, by leave of the court, discontinue against all but one, and take judgment against him alone, though the defendants plead jointly. *Coffee v. Planters' Bank of Tennessee*, 13 H. 188 . . . .xix. 454.

11. And where such a judgment was rendered on a count for money had and received, and no objection was taken in the court below, upon a writ of error, it was intended, in support of the judgment, that the liability of the defendant arose out of negotiable paper, and so was several as well as joint. *Ib.*

12. Where a set of pleas are all applicable to the first count, which was struck out after the issues thereon were made up, and the second count was not answered, it was regular to give judgment for the plaintiff for want of a plea. *Hogan v. Ross*, 13 H. 173 . . . .xix. 451.

#### EXECUTORS, &c. A. 3.

### I. INQUIRY AS TO DAMAGES.

1. Where the action is brought for a sum certain, or which may be rendered certain by computation, judgment for the damages may be entered by the court without a writ of inquiry. *Renner v. Marshall*, 1 W. 215 . . . .iii. 526.

2. As by the laws of Louisiana, questions of fact in civil cases are tried by the court, unless either of the parties demands a jury, in an action of debt on a judgment, the interest on the original judgment may be computed and make part of the judgment in Louisiana, without a writ of inquiry and the intervention of a jury. *Mayhew v. Thatcher*, 6 W. 129 . . . . v. 36.

3. Upon executing a writ of inquiry in Virginia, in an action of assumpsit upon a promissory note, it is necessary to produce a note corresponding with that declared on, but it is not necessary to prove the signature. *Sheehy v. Mandeville*, 7 C. 208 . . . . ii. 514.

### III. PRACTICE IN LOUISIANA.

1. If a case, which in its nature and objects is a suit in equity, is removed from a state court of Louisiana to the circuit court of the United States, it must be proceeded with, by the latter court, like other cases in equity; and it must be brought here on appeal, not by a writ of error. *Surgett v. Lapice*, 8 H. 48 . . . . xvii. 497.

2. The district court of the United States for Louisiana, prior to the act of May 26, 1824, (4 Stats. at Large, 62,) was required to proceed in equity according to the same principles, rules, and usages as the circuit courts of the United States administered; it made no difference whether there were, or were not courts in the State administering equity law. *Livingston v. Story*, 9 P. 632 . . . . xi. 508.

3. That act is broad enough to have adopted the equity practice and modes of proceeding of the district courts of the State, if there had been any; but, as there were none, that act had no application to equity cases. *Ib.*

4. Chancery practice does prevail in the circuit court of the United States for the district of Louisiana, and a complainant has a right to proceed in accordance with the rules prescribed by this court for the practice in equity of the circuit courts, and where they are silent, according to the practice of the high court of chancery in England. *Gaines v. Relf*, 15 P. 9 . . . . xiv. 5.

5. The courts of the United States in Louisiana are governed by the rules of practice in equity promulgated by this court under the act of congress of May 8, 1792, § 2, (1 Stats. at Large, 276.) *Story v. Livingston*, 13 P. 359 . . . . xiii. 196.

6. The practice of the circuit court of the United States for Louisiana, as to giving reasons for a judgment and as to the form and effect of verdicts, is governed by the acts of congress and the rules of the common law, and not by the laws of the State. *Parks v. Turner*, 12 H. 39 . . . . xix. 18.

7. A petition having been presented to a probate court in Louisiana, and thence transferred by consent to a district court of the same State; *Held*, that, as the petition charged the defendant with mal-administration of a succession, the district court had jurisdiction. *Fourniquet v. Perkins*, 7 H. 160 . . . . xvii. 70.

8. To maintain a petitory action for land, in the circuit court of the United States for Louisiana, the plaintiff must have the legal in contradistinction to the equitable title; and if he has only purchased a right to enter the lands, and

has taken out a patent in the name of his vendor, he cannot recover on that title. *Gilmer v. Poindexter*, 10 H. 257 . . . .xviii. 888.

9. A petition to a parish court, in Louisiana, for an injunction, which has been abandoned and discontinued, will not enable the court to take jurisdiction upon the answer of the defendant afterwards filed, and decree the property in question to the defendant. *Shelton v. Tiffin*, 6 H. 163 . . . .xvi. 643.

10. A violation of the contract by the plaintiff cannot be set up by the defendant at the trial, unless it is averred in the answer, according to Louisiana practice. *Wilcox v. Hunt*, 13 P. 378 . . . .xiii. 211.

11. Where a record from the district court for Louisiana, contained no bill of exceptions touching any instruction to the jury—*Held*, that even if all the evidence on which the jury passed had been in the record, this court could not examine the correctness of the verdict. *Parsons v. Bedford*, 3 P. 438 . . . .viii. 474.

12. In an action against a sheriff for taking property of the plaintiff, on an execution against a third person, in Louisiana, it is error to strike out of the answer an allegation that the property was conveyed to the plaintiff by the execution debtor to defraud his creditors. *Hozey v. Buchanan*, 16 P. 215 . . . .xiv. 258.

13. In Louisiana, where the judge passes on both fact and law, if a jury trial is not claimed, the proper practice is, for the judge to insert in the record the facts found by him, and this court, on a writ of error, must treat such facts as conclusively settled, and consider the law arising thereon, as upon a case stated. *United States v. King*, 7 H. 833 . . . .xvii. 425.

14. Under the practice in Louisiana, it is not proper to spread upon the record any other evidence than what relates to the points of law raised at the trial, and intended to be reviewed on error; and this court will intend that the record contains all the evidence which bore on those points. *Arthurs v. Hart*, 17 H. 6 . . . .xxi. 388.

15. In a trial at law in the circuit court for Louisiana, it is regular and proper to refuse to allow the clerk to take down the oral and documentary evidence; for no use could be made of it, as there can be no appeal. *Phillips v. Preston*, 5 H. 278 . . . .xvi. 396.

16. When a case comes here by a writ of error to the circuit court in Louisiana, and it appears that the whole case, both upon the law and the fact, was submitted to the judge without a jury, the admission or rejection of evidence merely, though excepted to, cannot be assigned for error. *Weems v. George*, 13 H. 190 . . . .xix. 458.

17. If a case at law in Louisiana, is submitted to the judge without a jury, and no exception is taken to any ruling on any matter of law, the finding is conclusive, and the judgment must be affirmed on error. *Bond v. Brown*, 12 H. 254 . . . .xix. 121.

18. A writ of error having brought up a record from the district court for Louisiana, in which it appeared that the law and fact were submitted to the court, and the testimony was all sent up in the record—*Held*, 1. That the 7th amendment of the constitution of the United States did not prevent parties from waiving their right to a trial by jury. 2. That this could not be treated as an appeal, nor was there any bill of exceptions so as to raise questions of

law upon the record. 3. That, in the actual state of this evidence, the court would entertain jurisdiction, but without intending to make a precedent for such mode of proceeding. *Parsons v. Armor*, 3 P. 413....viii. 467.

19. Under the practice of the district court of the United States for Louisiana, a summary judgment against a surety on an appeal bond is valid. *Hiriart v. Ballon*, 9 P. 156....xi. 319.

21. The obligor, becoming a security, submitted himself to be governed by the rule of the court, and had no right to a trial by jury. *Ib.*

ERROR, F. 18, 19.



## PRAYER.

EQUITY, B. b. 3; ERROR, I.; EXCEPTIONS, B.; PRACTICE, II. G. 4.

## PRE-EMPTIONS.

PUBLIC LANDS OF THE UNITED STATES, III. C.

## PRESIDENT.

CONSTITUTIONAL LAW, C. 2.

## PRESUMPTIONS.

EVIDENCE, B. 2; JURY, D. 1; PAYMENT, B.

1. Circumstances may justify a presumption of a grant, though the statute of limitations does not afford a bar. *Ewing's Lessee v. Burnet*, 11 P. 41....xii. 328.

2. Circumstances which will justify the jury in presuming a grant. *Zeller's Lessee v. Eckert*, 4 H. 289....xvi. 118.

3. After a long possession in severalty, a deed of partition may be presumed. *Hepburn v. Auld*, 5 C. 262....ii. 251.

4. What circumstances may be sufficient presumptive proof of the execution and delivery of a lost deed. *Sicard's Lessee v. Davis*; *Same v. Cecil*, 6 P. 124....x. 59.

5. A conveyance of land, as well as a grant of an incorporeal hereditament, may be presumed from long possession; but if such possession, and its circumstances, are consistent with the presumption that a less estate than a fee was its cause, a fee will not be presumed to have belonged to the party in possession. *Ricard v. Williams*, 7 W. 59....v. 221.

6. Though a disseisor cannot qualify his own wrong, yet, in considering the question whether a person is in by title, presumed from long possession to have

been made to him by the owner of the land, the claims accompanying that possession are very material. *Ib.*

7. On demurrer to the declaration, a release cannot be presumed from lapse of time. *Walden's Lessee v. Craig's Heirs*, 14 P. 147 . . . .xiii. 894.

8. The deposit of earth upon a water lot below high-water mark, so as to fit it for occupation and use, followed by the erection of a wharf and warehouse thereon, together with the possession of the adjacent upland lot for more than forty years, present a strong ground to presume a true title. *Watkins v. Holman*, 16 P. 25 . . . .xiv. 174.

9. Circumstances from which a grant of land may be presumed. *Robinson v. Minor*, 10 H. 627 . . . .xviii. 523.

10. A lawful partition by judicial decree among tenants in common, under which the demandant has received her legal share of her father's lands, cannot be presumed, as against the demandant, from lapse of time, and acquiescence, and the destruction of the records of the court having jurisdiction to make such partitions, if the demandant was married while under age, and continued under coverture until a short time before action brought. *Weatherhead's Lessee v. Baskerville*, 11 H. 329 . . . .xviii. 647.

11. Circumstances which will authorize a jury to presume the existence of a license from a patentee to use his invention. *M'Olurg v. Kingsland*, 1 H. 202 . .xiv. 567.

## PRINCIPAL AND SURETY.

### SURETY.

## PRIORITY OF PAYMENT OF THE UNITED STATES.

A. IN WHAT CASES, 401.

B. HOW WORKED OUT, AND ITS EFFECT ON THIRD PERSONS, 403.

### A. IN WHAT CASES.

1. Under the act of March 3, 1797, § 5, (1 Stats. at Large, 515,) the United States are entitled to a priority of payment, but not to a lien. *United States v. Hooe*, 3 C. 73 . . . .i. 531.

2. Mere inability to pay all his debts does not bring a debtor within this act. *Ib.*

3. The assignment mentioned therein is of all the property of the debtor, leaving him in a state equivalent to technical insolvency. *Ib.*

4. The 5th section of the act of the 3d of March, 1797, (1 Stats. at Large, 512,) giving a preference to the United States in cases of insolvency, is not confined to persons accountable for public money, but extends to debtors of the United States generally. *United States v. Fisher*, 2 C. 358 . . . .i. 496.



## 402 PRIORITY OF PAYMENT OF THE UNITED STATES.

5. Congress has power to make such a law. *Ib.*

6. An attachment of funds at the suit of a private person is not defeated by a subsequent attachment at the suit of the United States. *Beaston v. Farmers' Bank of Delaware*, 12 P. 102....xii. 655.

7. Under the acts of March 3, 1797, (1 Stats. at Large, 515, § 5,) and March 2, 1799, (1 Stats. at Large, 677, § 65,) the insolvency necessary to give the United States a priority must be a legal insolvency, and not a mere failure or inability to pay debts. *Prince v. Bartlett*, 8 C. 431....iii. 207.

8. The fifth section of the act of the 3d of March, 1797, (1 Stats. at Large, 515,) giving a priority of payment to the United States, out of the effects of their debtors, did not apply to a balance adjusted at the treasury after the act was passed, although one debt was previously contracted. *United States v. Bryan*, 9 C. 374....iii. 389.

9. In the distribution of a bankrupt's effects in this country, the United States are entitled to a preference, although the debt was contracted by a foreigner in a foreign country; and although the United States had proved their debt under the commission of bankruptcy, and had voted for an assignee. *Harrison v. Sterry*, 5 C. 289....ii. 267.

10. One partner being indebted to the United States, and the firm being insolvent, having assigned all its property for the benefit of its creditors, the United States have no right to priority of payment out of this fund, under the 65th section of the collection act of 1799, (1 Stats. at Large, 676.) *United States v. Hack*, 8 P. 271....xi. 96.

11. Under the 5th section of the act of March 3, 1797, (1 Stats. at Large, 515,) giving a right of priority of payment to the United States in certain cases, a corporation may be included under the word person. *Beaston v. Farmers' Bank of Delaware*, 12 P. 102....xii. 655.

12. The filing of a bill, and the appointment of receivers, the purpose of the suit being merely to collect a debt, do not amount to such a transfer of the property of the debtor as is contemplated by that act. *Ib.*

13. Under the act of March 3, 1797, (1 Stats. at Large, 512,) which is not controlled by the act of March 2, 1799, § 65, (1 Stats. at Large, 676,) the priority of the United States in case of a general assignment by their debtor, comprehends a bond for duties executed before the assignment, but payable afterwards. *United States v. State Bank of North Carolina*, 6 P. 29....x. 12.

14. The word insolvency, mentioned in the duty act of 1790, c. 35, § 45, (1 Stats. at Large, 169,) and repeated in the act of 1797, § 5, (1 Stats. at Large, 515,) and of 1799, § 56, (1 Stats. at Large, 676,) means a legal insolvency, which, whenever it occurs, the right of preference arises to the United States as well as in other specified cases to which the acts of 1797 and 1799 have extended the cases of insolvency. *Thelusson v. Smith*, 2 W. 396... iv. 150.

15. But if before the right of preference has accrued to the United States, the debtor has made a *bond fide* conveyance of his estate to a third person, or has mortgaged it to secure a debt, or if his property has been seized under an execution, the property is divested out of the debtor, and cannot be made liable to the United States. *Ib.*

16. A judgment gives the judgment-creditor a lien on the debtor's lands,

and a preference over all subsequent judgment-creditors. But the law defeats the preference in favor of the United States in the cases specified in the act of 1799. *Ib.*

17. The United States are not entitled to priority over other creditors, under the act of 1799, § 65, upon the ground of the debtor having made an assignment for the benefit of creditors, unless it is proved that the debtor has made an assignment of all his property. *United States v. Howland*, 4 W. 108.... iv. 360.

18. Where the deed of assignment conveys only the property mentioned in the schedule annexed, and the schedule does not purport to contain all the property of the party who made it, the *onus probandi* is thrown on the United States, to show that the assignment embraced all the property of the debtor. *Ib.*

## B. HOW WORKED OUT, AND ITS EFFECT ON THIRD PERSONS.

1. Under the act of March 2, 1799, § 65, (1 Stats. at Large, 676,) the priority of the United States is a right to prior payment out of the funds in the hands of the assignees, and does not prevent the property assigned from vesting in them, nor does it affect a mortgage of part of the debtor's property made to secure a *bond fide* debt. *Conard v. Atlantic Ins. Co. of New York*, 1 P. 386....vii. 637.

2. Under the 65th section of the collection act of March 2, 1799, (1 Stats. at Large, 676,) if the assignees of an insolvent debtor have notice of a claim of the United States, they are not protected by an order of a state court to distribute the funds to other creditors. *Field v. United States*, 9 P. 182....xi. 327.

3. If any of the property comes to their hands subject to liens, they must be satisfied out of that property, not out of the general fund. *Ib.*

## PRIVATEER.

### CAPTURE.

1. Under the act of June 14, 1797, (1 Stats. at Large, 520,) it was unlawful for citizens of the United States to cruise against Spain, under a commission from one of the new South American States. *The Bello Corrunes*, 6 W. 152....v. 44.

2. Collusive captures and violations of the revenue laws, committed by a private armed vessel, are a breach of the condition of the bond given by the owners, under the prize act of June 26, 1812, § 3, (2 Stats. at Large, 759.) *Greeley v. United States*, 8 W. 257....v. 406.

3. If such breach appear on demurrer the defendants are not entitled to a hearing in equity under the 26th section of the judiciary act. *Ib.*

## PRIVITY OF ESTATE.

Uses.

## PRIZE.

ADMIRALTY; CAPTURE.

## PROBABLE CAUSE.

CAPTURE, F.; EVIDENCE, B.; LAW OF NATIONS, C.; REVENUE LAWS, A. 2; F. 2

## PRO CONFESSO.

EQUITY, C. 12.

## PROCESS.

COURTS OF THE UNITED STATES, B.; JURISDICTION, F.; LAWS OF THE SEVERAL STATES, A.; PRACTICE, I. A. 1; II. A.

## PROCHEIN AML

1. The husband may be the *prochein ami* of the wife, on a bill in equity in which he has no interest. *Bein v. Heath*, 6 H. 228....xvi. 668.

2. A *prochein ami* cannot accept a release not conformable to the decree. *Morris v. Harmer's Heirs' Lessee*, 7 P. 554....x. 558.

## PROFERT.

PLEADING, E.

## PROFITS.

DAMAGES.

## PROHIBITION.

This court has not power, by a writ of prohibition, to revise the proceedings of the district court. *Ex parte Ohristy*, 3 H. 292....xv. 451.

JURISDICTION, C. 2.

## PROTEST.

BILLS, &c. E. F. 5; EVIDENCE, H.; NOTARY.

1. The statute of Mississippi, making the official act of a notary, certified under his hand, and attested by his notarial seal, evidence of certain matters, refers to what is commonly called the protest, that is, a certificate in writing made and signed by the notary, and bearing his official seal, declaring the acts done by him, and not to any previous record. *Brandon v. Loftus*, 4 H. 127....xvi. 48.

2. The statute of Mississippi, as to protesting inland bills, does not take away the action at common law without a protest, but gives an additional remedy, in which damages may be recovered, with a protest. *Bailey v. Dozier*, 6 H. 23....xvi. 587.

3. A verbal protest against the illegal exaction of duties is sufficient. *Swartwout v. Gihon*, 3 H. 110....xv. 824.

## PUBLIC ACCOUNTS.

RECEIVERS AND DISBURSERS OF PUBLIC MONEY.

## PUBLIC ACTS, RECORDS, AND JUDICIAL PROCEEDINGS.

CONSTITUTIONAL LAW, E.; EVIDENCE, G. 2.

## PUBLIC GRANTS.

CONSTITUTIONAL LAW, J.; CORPORATIONS, D. 1.

1. Rules of construction of public grants, especially those made to corporations, in derogation of common right. *Ohio Life Insurance and Trust Company v. Debolt*, 16 H. 416....xxi. 230.

2. A stipulation, by the legislature, that no court shall authorize another

ferry, does not prevent the power to license another from being conferred on the government of a city, by a subsequent act of the legislature. *Fanning v. Gregoire*, 16 H. 524. . . . xxi. 284.

3. If a grant of a ferry right by a State fairly admits of two interpretations, that shall be selected which least restricts the public rights. *Mills v. St. Clair County*, 8 H. 569. . . . xvii. 707.

## PUBLIC LANDS OF THE UNITED STATES.

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- I. TITLES OF THE UNITED STATES TO THE PUBLIC LANDS, AND THEIR POWERS AND REMEDIES IN REFERENCE THERETO.

## TREATIES, A. 4.

1. Congress alone has authority to make and authorize appropriations of the public lands. *United States v. Fitzgerald*, 15 P. 407 . . . .xiv. 128.

2. The question, whether a title to a portion of the public lands has passed from the United States, must depend exclusively upon the laws of the United States; when it has passed, it then becomes subject to state laws. *Wilcox v. Jackson*, 13 P. 498 . . . .xiii. 266.

3. The power of congress to "dispose of" the public lands is not limited to

sales thereof; they may be leased. *United States v. Gratiot*, 14 P. 526.... xiii. 644.

4. Congress has the sole power to declare the effect and the precedence of titles to the public lands emanating from the United States. *Bagnell v. Broderick*, 13 P. 436.... xiii. 235.

5. Under the act of congress of March 3, 1807, (2 Stats. at Large, 448,) the President had power to grant a license for one year to smelt lead at the mines in the State of Illinois, reserving a rent in kind, and stipulating for certain privileges connected therewith. *United States v. Gratiot*, 14 P. 526.... xiii. 644.

6. The mere possession of public land is no title against a grantee under the United States. *Burgess v. Gray*, 16 H. 48.... xxi. 25.

7. The grant of lands in Florida by the king of Spain to the duke of Alagon, whether it takes date from the royal order of December 17, 1817, or from the grant of February 6, 1818, and whether the title was held by him or his assignee, is annulled by the treaty between the United States and the king of Spain, signed February 22, 1819, by virtue of the declaration to that effect, made by the President of the United States, on presenting the treaty for an exchange of ratifications, and assented to by the king in writing, and again ratified by the senate of the United States. *Doe v. Braden*, 16 H. 635.... xxi. 327.

8. Whether the king of Spain had power thus to annul a grant, is a question foreclosed in every judicial tribunal of the United States, by the action of the President and senate, treating with him as having that power. *Ib.*

9. The royal title to lands, laying near forts, in Florida, examined. *Mitchel v. United States*, 15 P. 52.... xiv. 24.

10. It is an offence against the act of March 2, 1831, (4 Stats. at Large, 472,) if one cuts, with intent to appropriate to his own use, oak or hickory trees on the public lands of the United States. *United States v. Briggs*, 9 H. 351.... xviii. 172.

11. The United States having received the cession of the lands northwest of the Ohio River, not only in trust for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the confederation, have the right to prescribe the time within which Virginia military warrants might be located, and to annex conditions to the extension of the time. *Jackson v. Clark*, 1 P. 628.... vii. 736.

12. Construction of certain acts of assembly of Virginia concerning lands northwest of the Ohio River, namely; the act of 1783, ceding the lands to the United States; another act of 1783, for surveying and apportioning the lands granted to the Illinois regiment, and an act of 1790, an amendment thereof; an act of 1790, for surveying and locating lands granted to George Rogers Clark and others. *Hughes v. Clarksville*, 6 P. 369.... x. 148.

13. A title to lands, derived solely from a grant made by an Indian tribe northwest of the Ohio in 1778 and 1775, to private individuals, cannot be recognized in the courts of the United States. *Johnson and Graham's Lessee v. M'Intosh*, 8 W. 543.... v. 503.

14. The United States do not own the public quays on the Mississippi River in the city of New Orleans, nor the land made in front thereof by accretion. *New Orleans v. United States*, 10 P. 662.... xii. 292.



## II. PROCEEDINGS OF THE UNITED STATES IN THE RESERVATION, SURVEY, AND DISPOSAL OF THEIR PUBLIC LANDS.

*Infra*, C.

### 1. RESERVATION. (CONSTITUTIONAL LAW, C. 2.)

1. The preëmption act of May 29, 1830, (4 Stats. at Large, 420,) having forbidden entries on land appropriated for any public purpose—*Held*, that the President having, under the authority of congress, appropriated a tract of public land to the use of a military post, it was within the reservation. *Wilcox v. Jackson*, 13 P. 498....xiii. 266.

2. Whenever a tract of land has been appropriated to the public use, it is severed from the map of the public domain, and subsequent laws of sale are not construed to embrace it, though they do not in terms except it. *Ib.*

3. Assuming that the register and receiver of a land-office have a lawful jurisdiction to decide on the facts of a preëmption claim, if they undertake to grant land, which congress have declared shall not be granted, their act is void. *Ib.*

4. Under the reserve contained in the cession act of Virginia, and under the acts of congress, of August 10, 1790, (1 Stats. at Large, 182,) and of June 9, 1794, (1 Stats. at Large, 394,) the whole country lying between the Scioto and Little Miami rivers, was subjected to the military warrants, to satisfy which the reserve was made. *Doddridge v. Thompson*, 9 W. 469....vi. 136.

5. The territory lying between two rivers, is the whole country from their sources to their mouths; and if no branch of either of them has acquired the name, exclusive of another, the main branch, to its source, must be considered as the true river. *Ib.*

6. The act of June 26, 1812, (2 Stats. at Large, 764,) to ascertain the western boundary of the tract reserved for the military warrants, and which provisionally designates Ludlow's line as the western boundary, did not invalidate the title to land between that line and Roberts's line, acquired under a Virginia military warrant, previous to the passage of that act. *Ib.*

7. The land between Ludlow's and Roberts's line was not withdrawn from the territory liable to be surveyed for military warrants, by any act of congress passed before the act of June 26, 1812. *Ib.*

8. Construction of different acts of congress, as to the Virginia military reserve lands northwest of the River Ohio. *Reynolds v. M'Arthur*, 2 P. 417....viii. 155.

9. The proviso contained in the 10th section of the act of March 3, 1811, (2 Stats. at Large, 665,) reserving from sale tracts of land, the claim to which has been presented to the recorder, &c., does not apply to an unsurveyed claim, the boundaries of which are not ascertainable from the calls in the concession. *Menard's Heirs v. Massey*, 8 H. 293....xvii. 591.

10. A tract of land within the corporate limits of the city of Chicago, belonging to the United States, having been reserved for a fort, and public buildings placed thereon, a portion of the tract was afterwards sold, pursuant

to a plan on which the whole tract was laid down, as divided into lots, and having streets laid out thereon. *Held*, that it was not within the corporate powers of the city to open these streets on the land not sold to private persons. *United States v. Chicago*, 7 H. 185 . . . xvii. 82.

11. In the districts made by the act of June 26, 1834, (4 Stats. at Large, 686,) lead-mine lands were not subjected to sale, nor liable to be located on by the preëmption rights. *United States v. Gear*, 8 H. 120 . . . xv. 328.

12. Though the 10th section of the act of March 3, 1811, (2 Stats. at Large, 665,) does not reserve from sale lands claimed under Spanish concessions, unsurveyed, and the calls whereof do not designate any particular tract, yet a private survey is sufficient for this end, as was held in *Stoddard v. Chambers*, 2 How. 284. *Bissell v. Penrose*, 8 H. 317 . . . xvii. 605.

13. The proviso contained in the act of June 15, 1832, (4 Stats. at Large, 534,) requiring the claimant of back lands in Louisiana to give notice of his claim before proclamation of sale by the President, was prospective merely, and did not apply to a case where proclamation of sale had been made before the passage of the act. *Surgett v. Lapice*, 8 H. 48 . . . xvii. 497.

## 2. SURVEY.

1. Under the 1st section of the act of April 24, 1820, (3 Stats. at Large, 566,) and the instructions of the secretary of the treasury, the surveyor general was bound to divide fractional sections into as many half-quarter sections as practicable, by north and south, or east or west lines, so as to preserve the most compact forms; and if this be not done, the register cannot lawfully sell the land, and the act of the surveyor-general, in making a different division, is void. *Brown's Lessee v. Clements*, 8 H. 650 . . . xv. 580.

2. A patent which, by reason of such a void survey and division, appropriates to one preëmption claim what belongs to another, is void, as against the owner of the latter claim. *Ib.*

3. A survey of a Spanish concession, made by a surveyor and approved by the surveyor-general, under the act of April 29, 1816, (3 Stats. at Large, 325,) is binding, both on the United States and the grantee, but not on third persons. *Menard's Heirs v. Massey*, 8 H. 293 . . . xvii. 591.

## 3. SALE OR OTHER DISPOSAL.

Lands lying within the limits of the Zanesville land district, created by the act of March 3, 1803, (2 Stats. at Large, 287, § 6,) could not be sold at the Marietta land-office, after the passage of that act. *Matthews v. Zane's Lessee*, 5 C. 92 . . . ii. 200.

## III. RIGHTS ACQUIRED BY PRIVATE PERSONS AND BODIES POLITICAL, AGAINST THE UNITED STATES OR THEIR GRANTORS.

### A. BY ENTRY AND SURVEY.

1. The first appropriation of the land, under a location of a New Madrid certificate, is the return of the survey, by the surveyor, with a notice of loca-

tion, to the office of the recorder, but the location could be made on lands before they were offered at public sale. *Barry v. Gamble*, 3 H. 32 . . . . xv. 279.

2. An entry, under a settlement and preëmption right, made in the name of "the heirs" of the person who held those rights, is valid without naming the heirs. *Hunt v. Wickliffe*, 2 P. 201 . . . . viii. 85.

3. Though natural objects, capable of being identified, called for in a survey, will control courses and distances, yet, if the land is only described by course and distance, and reference to natural objects not distinguishable from others of the same kind, then course and distance are the only guides, and must alone be used to designate the land granted. *Chinoweth v. Haskell's Lessee*, 3 P. 92 . . . . viii. 301.

4. Under the act of March 2, 1807, (2 Stats. at Large, 424,) defective surveys protected the land from being patented under subsequent warrants and surveys by those claiming under the United States. *Jackson v. Clark*, 1 P. 628 . . . . vii. 736.

5. An authority "to enter" a certain quantity of land does not authorize a location on lands previously appropriated, or withdrawn from the lands offered for sale. *Chotard v. Pope*, 12 W. 586 . . . . vii. 376.

6. To support an entry, the objects called for in it must be so described, or so notorious, that others, by using reasonable diligence, could readily find them. *Watts v. Lindsey's Heirs*, 7 W. 158 . . . . v. 241.

7. Under the act of February 17, 1815, for the relief of the sufferers by earthquakes in the county of New Madrid, in Missouri, (3 Stats. at Large, 211,) the land located by the sufferer as a compensation for the land surrendered, is not deemed to be appropriated by him, until the survey is returned; the plat and certificate of the survey being the only evidence of location recognized by the government. *Bagnell v. Broderick*, 13 P. 436 . . . . xiii. 235.

8. Under the land laws applicable to the Virginia military lands in Ohio, a warrant may be withdrawn after a survey thereunder has been made and recorded. *Galt v. Galloway*, 4 P. 332 . . . . ix. 84.

9. The possession of the warrant, and the recognition by the principal surveyor of the right of the possessor to act for the owner of the warrant, are tantamount to a letter of attorney to him, from the owner, to make the entry, to alter or withdraw it, and to direct the survey; but this authority is terminated by the death of the owner of the warrant. *Id.*

10. A survey made in conformity with an entry, and not interfering with any other person's right, may be abandoned, even after it has been recorded; and the right to do so is not restrained by the act of March 2, 1807. (2 Stats. at Large, 424.) *Taylor's Lessee v. Myers*, 7 W. 23 . . . . v. 202.

11. Where the plaintiff claimed under a patent from the State of Virginia; *held*, that entries made subsequent to his patent could not affect his title. *Stringer v. Young's Lessee*, 3 P. 320 . . . . viii. 430.

## B. BY PATENT.

1. Though a public grant raises a presumption that every prerequisite has been complied with, the jury could not safely be instructed that no fraud in a public officer could invalidate it. *Patterson v. Jenks*, 2 P. 216 . . . . viii. 92.

2. A patent in the name of a deceased person conveys no title; but by the act of March 2, 1807, § 1, (2 Stats. at Large, 424,) land so patented in the Virginia military land district was withdrawn from location, and by the act of May 20, 1836, (5 Stats. at Large, 81,) the defect was cured, and the title vested in the heirs of the deceased patentee. *Galloway v. Finley*, 12 P. 264.... xii. 724.

3. A patent is a complete appropriation of the land it describes; and at law, no defect in the preliminary steps can be tried. *Stringer's Lessee v. Young*, 3 Pet. 320, confirmed. *Boardman v. Reed's Lessees*, 6 P. 328.... x. 135.

4. The entire description in a patent must be reasonably construed, to ascertain the identity of the land. *Ib.*

5. If a call is erroneous and repugnant, and enough remains, after rejecting it, to identify the land, the patent is not void. *Ib.*

6. A patent, issued to one whose claim under a Spanish title in Missouri had been confirmed by a board of commissioners, pursuant to an act of congress, is conclusive evidence that the grantee was the lawful owner of the title thus confirmed, and that he had the best Spanish title to that tract of land. *Landes v. Brant*, 10 H. 348.... xviii. 418.

7. Whatever may be the equities outstanding in third persons, the patentee has the legal title; and a state law cannot confer on the equitable owner the right to maintain ejectment against the patentee. *Bagnell v. Broderick*, 13 P. 436.... xiii. 285.

8. A patent from the State of Kentucky, of lands in the Indian country, passed the title, subject to the Indian right of occupancy. *Clark v. Smith*, 13 P. 195.... xiii. 119.

9. Under the act of June 9, 1794, (1 Stats. at Large, 894,) a patent for a part of the land embraced in the warrant may be issued to an assignee. *Bouldin v. Massie's Heirs*, 7 W. 122.... v. 234.

10. Proof of the assignment might be made in the surveyor's office, and certified to the officer issuing the patent by the surveyor. *Ib.*

11. Though the 8th section of the act of March 3, 1803, (2 Stats. at Large, 237,) requires the person seeking for a patent for lands, under a lost Virginia military warrant, to produce a certified duplicate thereof, yet as this was to protect the United States from fraud, a third party cannot object that when the patent was issued, such duplicate was not produced, there having been a certified copy on file in the land-office. *Ib.*

12. The fact of an assignment being brought in question, the testimony is to be examined to ascertain if it is proved; but after the emanation of a patent, the assignment having performed its office, is not ordinarily a title paper, and its non-production may be accounted for more easily than if it were one of the ordinary title papers. *Ib.*

C. BY LEGISLATIVE GRANT OR CONFIRMATION OPERATING DIRECTLY, OR THROUGH THE ACTION OF THE LAND OFFICE, OR OF COMMISSIONERS, AND HEREIN OF PRE-EMPTION RIGHTS AND FLOATING WARRANTS.

INDIANS, C. 2; *Infra*, IV. E.

## 1. DIRECT LEGISLATIVE GRANTS AND CONFIRMATIONS.

1. A confirmation, by act of congress of July 4, 1836, (5 Stats. at Large, 126,) held to make a good legal title, without a patent. *Chouteau v. Eckhart*, 2 H. 344....xv. 186.

2. An act of congress, confirming a title, makes a legal title without a patent. *Grignon's Lessee v. Astor*, 2 H. 319....xv. 125.

3. An act of congress confirming titles, excepted cases where the land had previously been located by any other person than the confirmee, under any law of the United States, or had been surveyed and sold by the United States. *Held*, that a location made on land reserved from sale by an act of congress, or a patent obtained for land so reserved, was not within the exception, and the title of the confirmee was made perfect by the act of confirmation, and without any patent, as against the prior patent, which was simply void; and this valid legal title enured at once to the benefit of an assignee of the confirmee. *Stoddard v. Chambers*, 2 H. 284....xv. 119.

4. The eighth section of the act of September 4, 1841, (5 Stats. at Large, 455,) granting lands to Louisiana and other States, did not vest the fee in those States; consequently, in a suit to try the legal title, one claiming such land under a patent from the United States, must prevail over one claiming under a patent from the State. *Foley v. Harrison*, 15 H. 433....xx. 589.

5. Under the act of August 8, 1846, (9 Stats. at Large, 51,) the commissioner of the general land-office had power to decide, finally, on the claims of these parties; and his decision, and a patent issued thereon, were conclusive in a suit for the land. *Ib.*

6. By the act of March 3, 1820, (3 Stats. at Large, 547, § 6,) granting four sections of land to the State of Missouri, a title to four sections of land was vested in the State, with power to select and locate the particular land; and when the selection was made by authorized commissioners, and notified to the surveyor-general, the title became attached to the particular land so selected. *Lessieur v. Price*, 12 H. 59....xix. 31.

7. Lands granted by the act of March 3, 1807, (2 Stats. at Large, 487,) in fulfilment of the second article of the treaty of 1794, between the United States and Great Britain, were not donations, and did not disqualify a settler from receiving a donation under the act of May 15, 1820, (3 Stats. at Large, 605,) and the act of March 3, 1823, (3 Stats. at Large, 786.) *Forsyth v. Reynolds*, 15 H. 858....xx. 561.

8. The act of March 26, 1804, § 14, (2 Stats. at Large, 287,) declaring void certain grants of land in Louisiana, is not affected by the acts of 1824, (4 Stats. at Large, 52,) or 1844, (5 Stats. at Large, 676.) *United States v. Reynes*, 9 H. 127....xviii. 65.

9. The act of March 3, 1807, (2 Stats. at Large, 440,) did not grant legal titles; it only enabled claimants of inchoate titles to obtain patents. *Burgess v. Gray*, 16 H. 48....xxi. 25.

10. The act of April 12, 1814, (3 Stats. at Large, 121,) confirmed only titles which had been rejected merely for want of evidence of inhabitancy on the 20th of December, 1803; and as it does not so appear, in reference to the plaintiff's title, he can take nothing under that act. *Ib.*

11. It is the settled doctrine of this court, that the country west of the Perdido River was not acquired from Spain as part of West Florida. *Pol-lard's Lessee v. Files*, 2 H. 591 . . . . xv. 220.

12. But though we hold the Spanish authorities could not make valid titles to lands there, after the acquisition of Louisiana by the United States, yet incipient titles acquired from those authorities might be, and to some extent have been, respected and confirmed by the United States; and such a title of the plaintiff in error, existing when the act of congress of 1824, (4 Stats. at Large, 66,) granted certain lands to the city of Mobile, it was within the exceptions of that act; and the subsequent confirmation, by congress, of the plaintiff's title, made it valid. *Ib.*

13. The act of April 29, 1816, § 1, (3 Stats. at Large, 329,) did not confirm the title to a quantity of land exceeding one league square. *United States v. King*, 3 H. 778 . . . . xv. 640.

14. The act of March 2, 1807, (2 Stats. at Large, 424,) was intended to cure defects in entries and surveys, which had occurred without fraud, in the pursuit of a valid title, but not to give validity to a title under a Virginia land warrant, not within the reservation made by that State in the act of cession of lands northwest of the Ohio. *Lindsey v. Miller's Lessee*, 6 P. 666 . . . . x. 304.

15. This act extends to every case which comes within the reservation made by Virginia in her act of cession; and a warrant which in fact was issued in virtue of a resolution of the general assembly of that State, before the act of cession, for military services in the continental line, is within the act of cession, though it does not purport on its face to be issued by virtue of such resolution, and though the term of service was not as great as was required by the standing law of the State for such grants at the time the resolution was passed. *Wallace v. Parker*, 6 P. 680 . . . . x. 811.

16. Under the act of congress of June 12, 1812, (2 Stats. at Large, 748,) respecting town and village lots, out lots, &c., in Missouri, it was not necessary that the claimant of an out lot should have had, either under the French or Spanish authorities, or from the United States, any written recognition of his title, or any public survey; nor was he required by the supplementary act of 1824, (4 Stats. at Large, 65,) to present the evidence of his claim and have it recognized. He might do so, and thus estop the United States and those claiming under them by subsequent grant; but he might also rely on proving the facts, made needful to his title by the act of 1812, through parol evidence, if his possession should be disturbed. *Guitard v. Stoddard*, 16 H. 494 . . . . xxi. 275.

## 2. GRANTS AND CONFIRMATIONS THROUGH THE ACTION OF SOME BOARD OR OFFICER.

1. The act of May 11, 1820, (3 Stats. at Large, 573, § 1,) did not confirm a claim to land, in Louisiana, which was inserted in the report of the register and receiver, and therein classed among claims which had already been confirmed, though in point of fact this claim had not then been confirmed. *Blanc v. Lafayette*, 11 H. 104 . . . . xviii. 565.

2. Under the act of March 31, 1814, (3 Stats. at Large, 116,) providing for the indemnification of claimants of public lands in the Mississippi territory,



and the acts in addition thereto, (3 Stats. at Large, 192, 235,) the decision of the commissioners upon matters within their jurisdiction was conclusive. *Brown v. Jackson*, 7 W. 218 . . . v. 252.

3. The decision in *Brown v. Gilman*, 4 W. 225, examined, and applied to this case. *Ib.*

4. Under the act of March 3, 1807, (2 Stats. at Large, 440,) a claimant of land in Missouri obtained no title to any particular tract, simply by a decision of commissioners that he had a title to an unlocated tract. A survey was necessary, in order to designate the land to which his title should attach. *West v. Cochran*, 17 H. 403 . . . xxi. 575.

### 3. PRE-EMPTION RIGHTS AND FLOATING WARRANTS.

1. A location under a New Madrid certificate amounted to an exchange of the land at New Madrid for the land located, and could not be made without the knowledge of the owner of the New Madrid claim. *Lessieur v. Price*, 12 H. 59 . . . xix. 81.

2. The inception of title to a particular tract of land under a New Madrid certificate, is the recording of the plat and survey in the recorder's office. *Ib.*

3. The title of a preëmption, under the act of May 29, 1830, (4 Stats. at Large, 420,) held to be better than titles under floating rights under the act of July 14, 1832, (4 Stats. at Large, 603,) and June 19, 1834, (4 Stats. at Large, 678,) and the patents for the latter set aside in equity. *Cunningham v. Ashley*, 14 H. 377 . . . xx. 233.

4. Under the first of these acts continued in force by the second, and the instructions of the commissioner of public lands, the preëmptioner was permitted to file his proofs, identifying the land in the absence of surveys; the register and receiver were constituted a tribunal to decide on the validity and extent of such preëmption rights, and their decision can be impeached only by evidence of fraud. *Lytle v. Arkansas*, 9 H. 314 . . . xviii. 154.

5. Where the misconduct, or neglect of a public officer, is the sole cause why an individual fails to obtain a title under a valid preëmption claim, equity will relieve him. *Ib.*

6. Under the acts above mentioned, the preëmption right is limited to the fractional quarter section on which his improvements were made, and does not extend to adjoining fractions not exceeding one hundred and sixty acres. *Ib.*

7. The act of June 15, 1832, (4 Stats. at Large, 531,) granting land to the territory of Arkansas, did not affect a preëmption right then duly proved. *Ib.*

8. No reservation, or appropriation of a tract of land, can be made, after a citizen has acquired a right to it under a preëmption law. *United States v. Fitzgerald*, 15 P. 401 . . . xiv. 128.

9. An officer of the United States is not deprived, by any act of congress, of the benefit of the preëmption laws. *Ib.*

10. The proviso in the 5th section of the act of March 3, 1811, (2 Stats. at Large, 663,) excluding from the right of preëmption back lands, "fit for cultivation, bordering on another river, creek, bayou, or watercourse," refers only to



lands bordering on some navigable water, and which also are fit for cultivation. *Surgett v. Lapice*, 8 H. 48 . . . . xvii. 497.

VENDOR AND PURCHASER, B. 1.

D BY TREATY WITH A FOREIGN NATION, AND PROCEEDINGS IN CONSEQUENCE THEREOF.

*Supra*, C. ; *Infra*, IV. E.

a. OF THE POWERS OF AGENTS OF FOREIGN NATIONS TO MAKE TITLES AND DO ACTS CONCERNING THEM.

INDIANS, C. 1 ; TREATIES, A. 8.

1. The act of March 26, 1804, § 14, (2 Stats. at Large, 287,) which annuls grants, made by the Spanish authority, of land between the Mississippi and the Perdido, is valid and binding. *Garcia v. Lee*, 12 P. 511 . . . . xii. 826.

2. After the 10th February, 1763, the date of the definitive treaty of peace between Great Britain, France, and Spain, by which the territory between the rivers Mississippi and Perdido was ceded to Great Britain, the French authorities could not grant lands therein. *Montault v. United States*, 12 H. 47 . . . . xix. 23.

3. Some account of the officers by whom the power to grant lands in Louisiana was exercised, under the Spanish authorities. *United States v. Moore*, 12 H. 209 . . . . xix. 106.

4. In Louisiana, down to 1798, while the power to grant lands was vested in the military governor of the province, the commandants of posts were employed to make the original concession and order of survey, and to put the applicant in possession. *Delassus v. United States*, 9 P. 117 . . . . xi. 803.

5. A grant or concession made by that officer who is authorized to make it, is presumed to be conformable to his powers. *Ib.*

6. The regulations of O'Reilly were intended for the government of subordinate officers, not to control the power of the governor. *Ib.*

7. The eighth article of the treaty between the United States and Spain, of February 22, 1819, (8 Stats. at Large, 252,) in speaking of grants by his Catholic majesty by his lawful authorities in the said territories, &c., has provided for grants made by a governor, generally authorized to grant lands, and his act is to be taken as not only *prima facie* valid, but as binding until disavowed, even if there was power in the crown to disavow it. *United States v. Clarke*, 8 P. 436 . . . . xi. 151.

8. The recital of a royal order, in a Spanish grant, which does not authorize the grant, does not necessarily show that the grant was made without authority. *Ib.*

9. From the year 1774, the governor of East Florida had power to grant lands, without being specially restricted as to quantity. *Ib.*

10. His order of survey, made after January 24, 1819, was made void by the treaty. *Ib.*

11. Under the act of May 23, 1828, (4 Stats. at Large, 284,) concerning private land claims in Florida, the acts of public officers of Spain, in making a grant of land, were presumed to be done by legitimate authority, and to be valid in the absence of fraud. *United States v. Arredondo*, 6 P. 691 . . . . x. 315.

12. Though a presumption arises from the grant itself that the officer had authority to make it, the court proceeded to examine the proceedings, it being alleged they were void on their face. *United States v. Percheman*, 7 P. 51 . . . . x. 393.

13. Certain titles to lands, in the city of St. Louis, depending on the laws of Spain, and the effect of the treaty of Louisiana, examined. *Strother v. Lucas*, 12 P. 410 . . . . xii. 763.

14. Mr. Justice Baldwin gave an opinion in which three other justices concurred. Mr. Justice Catron concurred in the judgment, for reasons contained in his opinion. Justices M'Lean, Wayne, and M'Kinley dissented. Mr. Chief Justice Taney did not sit. *Ib.*

15. A grant made by the British governor of Florida, after the declaration of independence, within the territory lying between the Mississippi and the Chatahouchee rivers, and between the 31st degree of north latitude, and a line drawn from the mouth of the Yazoo River due east to the Chatahouchee, is invalid as the foundation of title in the courts of the United States. *Harcourt v. Gaillard*, 12 W. 523 . . . . vii. 329.

16. Spanish grants made after the treaty of peace of 1782, between the United States and Great Britain, within the territory east of the River Mississippi, and north of a line drawn from that River, at the 31st degree of north latitude, east to the middle of the River Appalachicola, have no intrinsic validity, and the holders must depend for their titles exclusively on the laws of the United States. *Henderson v. Poindexter's Lessee*, 12 W. 530 . . . . vii. 334.

17. No Spanish grant, made while the country was wrongfully occupied by Spain, can be valid, unless it was confirmed by the compact between the United States and the State of Georgia, of the 24th April, 1802, or has been laid before the board of commissioners constituted by the act of congress of the 3d. of March, 1803, (2 Stats. at Large, 229,) and of March 27, 1804, (2 Stats. at Large, 303.) *Ib.*

18. The surveyor-general, under the Spanish government of Florida, had not authority to change the location of a grant, or split up the surveys. He was bound to make the surveys in reasonable conformity with the grant. *Villalobos v. United States*, 10 H. 541 . . . . xviii. 500.

19. A grant of land lying between the rivers Mississippi and Perdido, made by the Spanish authorities, after Spain had ceased to have lawful power to grant lands in Louisiana, held void. *United States v. Reynes*, 9 H. 127 . . . . xviii. 65.

20. The military commander, under whose orders West Florida was conquered by Spain from Great Britain in 1780-1, had not power, in that capacity, to make grants of lands in that province. *United States v. Power's Heirs*, 11 H. 570 . . . . xviii. 714.

21. The history of the Spanish power in Florida stated. *Ib.*

22. A grant of land by the Spanish governor of East Florida, held to be within former decisions, and confirmed. *United States v. Arredondo's Heirs*, 13 P. 88 . . . . xiii. 53.

23. A grant of land by the Spanish governor of East Florida confirmed. *United States v. Waterman's Heirs*, 14 P. 478 . . . . xiii. 601.

24. The powers of the provincial deputation at Havana and of the council

of East Florida, in making grants in the last-named province, examined *United States v. Delespine's Heirs*, 15 P. 319....xiv. 100.

25. The authorities of Spain had power to make grants of the public domain in Florida, in accordance with their own ideas of the merits of the grantee; and this court can only pass on the questions, whether a grant was made, and what was its legal effect. *United States v. Hanson*, 16 P. 196....xiv. 248.

26. The Spanish governor of East Florida, as the king's deputy, was the sole judge of the merits of an applicant, and of the sufficiency of the consideration of a grant. *United States v. Acosta*, 1 H. 24....xiv. 483.

27. Under the laws of Mexico, the public authorities of California had power to make grants of mission lands. *United States v. Ritchie*, 17 H. 525....xxi. 656.

28. In Louisiana, after the power to grant lands was transferred from the military governor to the intendant-general, in 1798, the commanders of posts were sub-delegates, and their power to make orders of survey, and thus to make incipient titles capable of being perfected into complete titles, was not affected. *Chouteau's Heirs v. United States*, 9 P. 187....xi. 312.

#### b. OF THE EVIDENCE OF THEIR ACTS.

1. Though a document, purporting to be a return of a Spanish survey, had been recognized by the Spanish colonial authorities as genuine, and is therefore to be deemed so *primâ facie*, yet it may be shown to be antedated and forged. *United States v. King*, 8 H. 773....xv. 640.

2. The original of a Spanish grant having been mutilated, while remaining in the proper office, and a certified copy destroyed, *held*, that a copy of a copy was the next best evidence, and admissible. *United States v. Delespine's Heirs*, 12 P. 654....xii. 882.

3. A paper writing, making a grant by a royal officer of Spain, in Florida, addressed to a public officer whose duty it was to keep the original and issue a copy, need not be produced; the copy issued by the proper officer is an original. *United States v. Percheman*, 7 P. 51....x. 393.

4. The practice and usages of the government officers of Spain, in relation to title papers of grants made by Spanish authority, in East Florida, may be proved by parol. *United States v. Wiggins*, 14 P. 334....xiii. 488.

5. The originals being kept in a public office, and certified copies furnished to grantees, these copies are evidence. *Ib.*

6. The authenticity of a document having been sanctioned by a Spanish tribunal, which acted on it, in making a title, it is too late to question its genuineness, as it respects that title. *United States v. Delespine*, 15 P. 319....xiv. 100.

7. The certificate of a survey, by the surveyor-general of the Spanish province of Florida, is to be taken as *primâ facie* correct. *United States v. Breward*, 16 P. 143....xiv. 217.

8. The original of a grant of land by the Spanish governor of East Florida not being found in the proper depository, a copy, certified by the secretary of the Spanish government, was held admissible. *United States v. Acosta*, 1 H. 24....xiv. 483.

9. The return of a private surveyor, employed as the agent of the grantee, is not presumed to be correct; it is a mere private paper, and is not evidence. *United States v. Hanson*, 16 P. 196 . . . .xiv. 248.

10. An official certificate of the secretary of the Spanish government of East Florida, is evidence of the title papers, the originals of which were kept in the public archives. *United States v. Rodman*, 15 P. 130 . . . .xiv. 50.

11. An official certificate of the secretary of the Spanish government of East Florida is evidence of the genuineness of a copy of the grant. *United States v. Delespine*, 15 P. 226 . . . .xiv. 78.

12. A warrant or order of survey of lands made by the Spanish authorities at Mobile, in the year 1806, did not confer a complete legal title. *De La Croix v. Chamberlain*, 12 W. 599 . . . .vii. 386.

**c. OF COMPLETE TITLES, AND HEREIN OF THE NATURE AND SOURCES OF SUCH TITLES TO LANDS LYING WITHIN TERRITORY CEDED BY FOREIGN NATIONS TO THE UNITED STATES, AND OF THE PERFORMANCE OF CONDITIONS.**

1. Grants made by the French authorities in Louisiana, after the date of the treaty of Fontainebleau, (8 Stats. at Large, 200,) held void, unless continued possession laid a foundation for presuming a confirmation by the authorities of Spain; in which case, as the titles would be complete and legal, a remedy is not afforded by the act of May 26, 1824, (4 Stats. at Large, 52,) but the titles are to be tried in the usual modes, under the laws and practice of the State. *United States v. Pillerin*, 13 H. 9 . . . .xix. 355.

2. Petition dismissed without prejudice. *Ib.*

3. The form of a complete Spanish title given. *Menard's Heirs v. Massey*, 8 H. 293 . . . .xvii. 591.

4. The effect of the treaty of cession, between the United States and Spain, of February 22, 1819, (8 Stats. at Large, 252,) upon the titles to lands in Florida, declared. *Mitchell v. United States*, 9 P. 711 . . . .xi. 539.

5. By the 8th article of this treaty the lands theretofore completely granted by the king were excepted out of the grant to the United States. The original of that treaty, in the Spanish language, not corresponding precisely with the original in English, the language of the former is to be taken as expressing the intent of the grantor as to the lands granted and reserved. *United States v. Arredondo*, 6 P. 691 . . . .x. 315.

6. Under this article, the title to lands which had been granted by the king of Spain, was confirmed by force of the instrument itself. *United States v. Percheman*, 7 P. 51 . . . .x. 393.

7. The fact that the applicant for land in Louisiana, while under the Spanish government, possessed the requisite amount of property to entitle him to the land he solicited, was decided upon by the officer who granted the application, and need not be proved on a petition for confirmation of the title. *Ohouteau's Heirs v. United States*, 9 P. 147 . . . .xi. 316.

8. The eighth regulation of O'Reilly did not prohibit different grants to one individual amounting to more than one league square, but that no grant should exceed one league. *Ib.*

## d. OF INCHOATE TITLES.

## 1. NATURE AND SOURCES OF THESE TITLES, AND CONTROL OF THE POLITICAL POWER OVER THEIR REMEDIES.

CONSTITUTIONAL LAW, C. 1; *Supra*, D. a.

1. An inchoate title to land is a right of property protected by the treaty for the cession of Louisiana. *Delassus v. United States*, 9 P. 117 . . . . xi. 303.

2. Incomplete Spanish titles were not rendered complete by the treaty by which Louisiana was acquired; the government of the United States succeeded to the powers and duties of the crown of Spain as to confirmations of such titles, and where there were two adverse claimants, might select between them, and make a perfect title to one and wholly exclude the other. *Chouteau v. Eckhart*, 2 H. 344 . . . . xv. 136.

3. The titles to village lots and commons in upper Louisiana described. *Ib.*

4. The owner of a claim to an inchoate title never<sup>t</sup> had any standing in a court of justice, till conferred upon him by the political power; and as between two such claimants, asserting conflicting rights, the political power could determine which should have title. *Les Bois v. Bremell*, 4 H. 449 . . . . xvi. 170.

5. Such an incipient title, followed by a survey, was properly protected by the treaty. *Chouteau's Heirs v. United States*, 9 P. 137 . . . . xi. 312.

6. The 8th article of the treaty with Spain, of January 24, 1818, (8 Stats. at Large, 252,) does not *proprio vigore*, confirm grants; it was reserved for congress to act and execute it. *Foster v. Neilson*, 2 P. 253 . . . . viii. 108.

## 2. REMEDIES PROVIDED BY THE UNITED STATES, AS RESPECTS JURISDICTION, PARTIES, SUBJECT-MATTER AND MODES AND FORMS OF PROCEEDINGS.

## STATE COURTS AND MAGISTRATES, A. 4.

1. Though the petition call the title perfect, yet it being apparent, from the facts stated in the petition, that it emanated from a commander of a military post, who could confer only an incipient, and not a complete title, according to the laws of Spain, the petition should not be dismissed for that cause. *United States v. Davenport's Heirs*, 15 H. 1 . . . . xx. 368.

2. But as respects so much of the land as had been sold by the United States, as the grantees are not made parties, no decree can be made in favor of the petitioners. *Ib.*

3. The petitioner claiming to represent B's heirs, as their assignee, in a petition for a confirmation of a Spanish grant, and the evidence of the assignment to him being unsatisfactory, it was ordered that the confirmation should be for the use of the legal representatives of B. *United States v. Patterson*, 15 H. 10 . . . . xx. 373.

4. A third person, whose right, if any, is barred, as against the United States, cannot intervene in this court, and assert his title under such a petition. *Ib.*

5. A claim, under a grant, by the Western or Mississippi Company, in 1717, to Duvernay, if it could be supported upon the evidence, would be a legal title,

and is not a subject of a petition under the act of May 26, 1824, (4 Stats. at Large, 52,) as revived by the act of June 17, 1844, (5 Stats. at Large, 676.) *United States v. D'Auterive*, 15 H. 14....xx. 375.

6. Moreover, it has not such definite location and boundaries as to separate it from the public domain. *Ib.*

7. If these objections could be overcome, upon the evidence before the court respecting a subsequent confirmation by the Spanish authorities, it would appear that that confirmation did not extend to the land in question. *Ib.*

8. If the grantee had a perfect legal title under a Spanish grant, or an act of congress, he could not maintain a petition under the land acts of 1824 and 1844. *United States v. Roselius*, 15 H. 31....xx. 385.

9. A complete Spanish title will not support a petition under the act of May, 26, 1824. *United States v. Roselius*, 15 H. 36....xx. 389.

10. Under the eleventh section of this act, compensation for lands sold by the United States, could not be made, if the petitioner claimed under a perfect title. *United States v. Roselius*, 15 H. 31....xx. 385.

11. Under this act the district court had not power to adjudge upon naked evidence of possession, unaccompanied by any paper title. *United States v. Power's Heirs*, 11 H. 570....xviii. 714.

12. A grant by a Spanish governor of East Florida confirmed, without passing on the derivative title of the petitioner. *United States v. Chaires*, 10 P. 308....xii. 137.

13. Under the act of May 26, 1830, (4 Stats. at Large, 405,) concerning land claims in Florida, the district court had jurisdiction of a claim rejected by the commissioners; such a rejection not being final action thereon within the meaning of that act. *United States v. Percheman*, 7 P. 51....x. 393.

14. The jurisdiction conferred by this act is a special and limited jurisdiction, and if the averments in the petition do not bring the case within that jurisdiction, the proceedings are void. *United States v. Clarke*, 8 P. 436....xi. 151.

15. The act of May 26, 1824, respecting proceedings to try the validity of private land claims in Missouri, reenacted and extended to Mississippi and other States by the act of June 17, 1844, is, and if not repealed, will continue in force as to all appeals from the district courts to this court, including appeals from Mississippi. *United States v. Boisdoré's Heirs*, 8 H. 113....xvii. 517.

16. A judgment that a demurrer to a petition for the confirmation of a Spanish title in Louisiana, under the act of May 26, 1824, be sustained, but taking no further order concerning the petition, is not final, and an appeal to this court does not lie. *De Armas's Heirs v. United States*, 6 H. 103....xvi. 615.

17. Under the ninth section of this act, it is sufficient, if the district attorney claims an appeal, and it is sanctioned in this court by the attorney-general. *United States v. Curry*, 6 H. 106....xvi. 617.

18. A citation issued in August, 1847, could not bring up an appeal claimed in November, 1846. *Ib.*

19. Under the act of May 23, 1828, (4 Stats. at Large, 284,) concerning the confirmation of private land claims in Florida, an appeal, not taken in open



court, but claimed in the clerk's office, is a nullity, without a citation returnable at the then next term of this court. *Villabolas v. United States*, 6 H. 81.... xvi. 607.

19a. The district court, proceeding under the act of May 26, 1824, cannot make an indefinite decree in favor of the petitioner, for such quantity of land as the United States may have sold of the land adjudged to belong to him; the precise quantity must be ascertained by the decree; and it is to this end, in part, that the act requires those in possession of any part of the land claimed by the petitioner, to be made parties. *United States v. Moore*, 12 H. 209.... xix. 106.

20. Though the amendatory and repealing clauses of the acts of May 23, 1828, (4 Stats. at Large, 284,) and May 24, 1828, (4 Stats. at Large, 298,) do not require adverse claimants to be made parties to a petition, yet the act of June 17, 1844, (5 Stats. at Large, 676,) which revived and extended the act of 1824, does not incorporate those provisions in either of these acts of 1828, and proceeding under this act of 1844, adverse claimants must be made parties. *Ib.*

21. A petition to confirm a Spanish title in Louisiana, under the act of May 26, 1824, must contain an allegation of the residence of the grantee in Louisiana, at the date of the grant, or previous to March 10, 1804; and the title shown must not be a complete title. *United States v. Castant*, 12 H. 437.... xix. 228.

22. The petition of the appellees, founded on a British grant, dismissed, because, if any title was made thereby, it was a complete legal title, and the district court had not jurisdiction under this act, as revived by the act of June 17, 1844. *United States v. McCullagh*, 13 H. 216.... xix. 465.

23. The former act merely gave a remedy by which existing incomplete French and Spanish titles could be made complete; it did not otherwise add strength to such titles. And the latter act only extended the operation of the act of 1824 to other territory, without enlarging the rights or strengthening the claims of the holders of such titles. *United States v. Reynes*, 9 H. 127.... xviii. 65.

23a. A complete Spanish or French title is not within either of the said acts. *Ib.*

24. The rule, that a complete French title will not support a petition under the act of May 26, 1824, affirmed. *United States v. Ducros*, 15 H. 38.... xx. 391.

25. An assignee could claim under a Spanish concession and obtain a confirmation by commissioners, in the name of the original owner of the Spanish title, and, when confirmed, the legal title enured to the assignee. *Bissell v. Penrose*, 8 H. 317.... xvii. 605.

26. Lead mines are not excepted in the act of May 26, 1824, as to confirmations of French and Spanish titles. *Delassus v. United States*, 9 P. 117.... xi. 303.

27. The objection that the petitioner has conveyed the land to a third person is not to be inquired into. *United States v. Percheman*, 7 P. 51.... x. 393.

28. The 12th section of the act of August 31, 1852, (10 Stats. at Large, 99,)



dispenses with the requirements of the 9th section of the act of March 3, 1851, (9 Stats. at Large, 631,) respecting the mode of proceeding in the district court of California, when either party is dissatisfied with the award of the commissioners concerning titles to land in that State. And the provisions of the law of 1852, concerning pleadings and notice, are not so defective as to be invalid. *United States v. Ritchie*, 17 H. 525 . . . . xxi. 656.

29. Though the act of 1851 terms the proceeding in the district court an appeal, and, inasmuch as the commissioners cannot exercise any part of the judicial power under the constitution, there can be no appeal, strictly speaking, from their decision; yet the proceeding in the district court may be, and is considered by this court to be an original proceeding there with a right of appeal to this court. *Ib.*

### 3. LIMITATIONS OF REMEDIES.

1. Under the act of May 26, 1830, (4 Stats. at Large, 405,) concerning land claims in Florida, if any limitation of time for filing a petition is implied, it can only be one year from the date of that act. *United States v. Delespine*, 15 P. 319 . . . . xiv. 100.

2. The act of May 26, 1824, (4 Stats. at Large, 52,) revived by the act of June 17, 1844, (5 Stats. at Large, 676,) limits the right to file a petition under a French or Spanish grant, to two years from the passage of the latter act. *United States v. Porche*, 12 H. 426 . . . . xix. 223.

3. Neither the act of April 25, 1812, § 4, (2 Stats. at Large, 715,) nor any subsequent act, barred a French, Spanish, or British claim to lands, which had not been surveyed and sold by the United States, by reason of the failure to record the title papers evidencing the same. *United States v. Power's Heirs*, 11 H. 570 . . . . xviii. 714.

### 4. WHAT ACTS OF AGENTS OF FOREIGN NATIONS GAVE INCHOATE TITLES, AND TO WHAT SUCH TITLES EXTENDED.

1. Grants by the military commander of the Spanish post at Nacogdoches, for the purpose of grazing, fitted and used for that object, and having legally defined limits, held sufficient to confer an equitable title, calling for confirmation by this court. *United States v. Davenport's Heirs*, 15 H. 1 . . . . xx. 368.

2. A grant, by the governor of East Florida, of 15,000 acres of land in that province, containing a direction, "the surveyor-general will run them for him in the places he mentions, or in others that are vacant, and of equal convenience to the party," authorized a survey in more than two places, and of any vacant lands in the province, to make out the quantity. *United States v. Clarke's Heirs*, 16 P. 228 . . . . xiv. 265.

3. A grant of "ten thousand acres on the northwest side of the head or lagoon of Indian River," made by the local authorities of Spain in East Florida,—*held*, under the circumstances, to be sufficiently specific to support a survey, made after the date of the treaty of 1819, between the United States and Spain. *United States v. Low*, 16 P. 162 . . . . xiv. 230.

4. In conformity with previous decisions, the imperfect title of the petitioner to land in Missouri, under an order of survey from the local authority of Spain, was confirmed, and a survey was directed to ascertain what part of the land had been sold by the United States, that warrants for an equal quantity might be issued, to be located on public lands in Missouri offered for sale. *Soulard's Heirs v. United States*, 10 P. 100 . . . . xii. 31.

4a. A claim to lands in Florida under a Spanish concession confirmed; but one of the surveys held not conformable to the grant, and a new survey ordered. *United States v. Seton*, 10 P. 309 . . . . xii. 138.

5. A title to lands in Florida, obtained from various tribes of Indians, and confirmed by the local authorities of Spain, held valid as against the United States. *Mitchel v. United States*, 9 P. 711 . . . . xi. 539.

6. The validity of concessions of land conditional, as well as absolute, made by the authorities of Spain, in East Florida, is expressly recognized in the treaty (8 Stats. at Large, 252,) of cession, and in several acts of congress. *United States v. Clarke*, 9 P. 168 . . . . xi. 320.

7. The court held the following to be a grant of land, by the Spanish governor of East Florida: "License to construct a water saw-mill, on the creek known by the name of Pottsburg, bounded by the lands of Strawberry Hill, and this tract not being sufficient, I grant him the equivalent quantity in Cedar Swamp, about a mile east of M'Queen's Mill, but with the precise condition that, as long as he does not erect said machinery, this grant will be considered null and without value or effect, until that event takes place; and then, in order that he may not receive any prejudice from the expensive expenditures which he is preparing, he will have the faculty of using the pines and other trees comprehended in the square of five miles, or the equivalent thereof, which five miles are granted to him in the mentioned place, the avails of which he will enjoy without any defalcation whatever." But refused to confirm the title to so much as was included in a survey which embraced a greater quantity than was granted. *United States v. Richard*, 8 P. 470 . . . . xi. 176.

8. Confirmation of a grant made by the Spanish governor of East Florida. *United States v. Huertas*, 8 P. 475 . . . . xi. 180. *United States v. Gomez*, 8 P. 477 . . . . xi. 181. *United States v. Fleming's Heirs*, 8 P. 478 . . . . xi. 181. *United States v. Younge*, 8 P. 484 . . . . xi. 185. *United States v. Hernandez*, 8 P. 485 . . . . xi. 186.

9. Confirmation of a grant of land made by the British governor of Florida, and confirmed by the Spanish authorities. *United States v. Fatio's Heirs*, 8 P. 492 . . . . xi. 190. *United States v. Gibson*, 8 P. 494 . . . . xi. 191.

10. The Spanish governor of East Florida was the sole judge of the conditions and consideration of a grant made by him. *United States v. Segui*, 10 P. 306 . . . . xii. 136.

11. An inquisition having been taken under the Spanish authorities, by which it was found that the Indians had previously abandoned the lands granted, this was held to be *res judicata*. *United States v. Arredondo*, 6 P. 691 . . . . x. 315.

12. The regulations of O'Reilly were not in force in upper Louisiana. *Mackey v. United States*, 10 P. 340 . . . . xii. 158.

13. A concession by the lieutenant-governor of upper Louisiana, particularly describing the tract, and ordering a survey, &c., held valid. *Ib.*

14. Though a grant declares that it was made in conformity with a royal order, yet if it also shows that it had other considerations, and in fact was not founded on that order, the grant is not invalid because the quantity of land granted is greater than that royal order permitted. *United States v. Rodman*, 15 P. 130 . . . .xiv. 50.

15. The principles of the decisions of this court concerning titles in Louisiana and Florida, examined, and distinctions between those titles and titles in California, stated. *Fremont v. United States*, 17 H. 542 . . . .xxi. 667.

16. A grant by the Mexican governor of California, of ten square leagues of land within a certain district of country, in consideration of meritorious services of the grantee, conferred an equitable right to that quantity of land within that district, valid as against the Mexican government, and consequently as against the United States, though the particular tract had not been designated by a survey, at the time of the cession to the United States ; and the particular land to which this title is to attach, must be ascertained by a survey made under the authority and in the mode provided by the laws of the United States. *Ib.*

17. The force and effect of the conditions subsequent, annexed to this grant, considered. *Ib.*

#### 5. WHAT ACTS GAVE NO TITLE. (*Supra*, D. a.)

1. The Spanish governor of Louisiana, in 1788, made a gratuitous concession of a tract of land for a *vacherie* to the ancestor of the appellees; no survey was made of the tract while the country was held by Spain ; the calls of the grant were so vague that the land could not be identified without a survey, and the consideration for the grant, namely, the removal of the petitioner and his family and slaves to the land, did not appear to have been executed. *Held*, that the appellees had no title as against the United States. *United States v. Boisdoré*, 11 H. 63 . . . .xviii. 548.

2. A grant made by the French authorities in Louisiana in 1722, unaided by a survey, and the calls in which were too vague and indeterminate to separate any particular tract of land from the public domain, will not support an action of ejectment. *Denise v. Ruggles*, 16 H. 242 . . . .xxi. 109.

3. The title of Dubuque, under an alleged grant from the Fox Indians, confirmed by the Spanish governor of Louisiana, *held* to be merely a permit to work mines, and occupy for that purpose the needful land. *Chouteau v. Molony*, 16 H. 203 . . . .xxi. 87.

4. If a concession of land by the governor of East Florida did not ascertain the particular land granted, so that it could be severed from the public domain by a survey pursuant to calls in the grant, and if the only survey, made for the grantee under the Spanish authorities, was of land not granted, the grantee has no title, as against the United States, which a court of justice can confirm. *United States v. Forbes*, 15 P. 173 . . . .xiv. 63.

5. A grant, too indefinite to be located, and never actually located by any survey under Spanish authority, is void as against the United States. *United States v. Delespine*, 15 P. 319 . . . .xiv. 100.

6. A grant, containing no calls by which it could be located, and not in fact located by the Spanish authorities, is void. *Buyck v. United States*, 15 P. 215....xiv. 74.

7. A grant, by the local authorities of Spain, in East Florida, of "a square of eight leagues of land on the waters of Hillsborough and Tampa bays," not located by a survey recognized by those authorities before January 24, 1818, did not separate any particular tract from the public domain, is not capable of being surveyed by its calls, and consequently made no title which is protected by the treaty of 1819, between the United States and Spain. *United States v. Miranda*, 16 P. 153....xiv. 224.

8. A survey by the surveyor-general of Florida, made after January 24, 1818, at a different place from that called for by a grant, is inoperative. *United States v. Breward*, 16 P. 148....xiv. 217.

9. But if the grant sufficiently described the land to enable a surveyor to run the lines, it was valid, and a survey will be directed. *Ib.*

10. Under a Spanish concession in East Florida, the survey must be made as called for in the concession, and if the whole quantity cannot thus be had, by reason of prior grants, an equivalent elsewhere cannot be taken. *United States v. Arredondo's Heirs*, 13 P. 133....xiii. 88.

11. The court is not satisfied that a usage existed in East Florida, while under the government of Spain, to survey land clear of water and marsh embraced in the calls for a survey. *United States v. Levy*, 13 P. 81....xiii. 51.

12. If such a custom existed, it could not be applied to a case where an actual survey, carried into a grant, included water and marsh. *Ib.*

13. The courts of the United States cannot give effect to such a custom; so to do would be equivalent to a new concession. *Ib.*

14. A French grant of a lot running back to a lake was not confirmed by the Spanish governor, merely because he acted quasi-judicially on an inventory of the deceased grantee's estate, which mentioned the land as running back to the lake. *United States v. Ducros*, 15 H. 38....xx. 391.

15. The Spanish grant relied on, not containing enough to identify any particular tract of land, and no legal survey having been made, the grantee has no title. *Villalobos v. United States*, 10 H. 541....xviii. 500.

16. The decree of Governor Carondelet of June 20, 1797, appropriating certain lands for the use of a colony, to be formed by the Baron de Bastrop, did not vest any title to the land, therein referred to, in the baron; it only set it apart to be granted in future to the colonists when settled thereon. *United States v. Philadelphia and New Orleans*, 11 H. 609....xviii. 730.

17. A concession was made by the Spanish lieutenant-governor of Nacogdoches, in 1797, not followed by any action of the proper officer to put the grantee in possession, nor by any survey, the calls in the concession being too vague to identify the particular tract intended to be granted, and the possession taken being only of a very small part of the quantity embraced in the concession. *Held*, that the representatives of the grantee had no title as against the United States. *Lecompte v. United States*, 11 H. 115....xviii. 568.

18. Under the act of May 26, 1824, (4 Stats. at Large, 52,) a claim to land in Missouri cannot be confirmed, unless some particular tract of land was severed from the mass of the domain of the crown, by an authorized survey, or

by such a description in the concession, grant, warrant, or order of survey, as is capable of being followed by a survey pursuant to its calls. *Smith v. United States*, 10 P. 326 . . . . xii. 143.

19. The principle of the case of *Smith v. United States*, 10 P. 326, applied, and the confirmation refused. *Wherry v. United States*, 10 P. 338 . . . . xii. 152.

20. The contracts between the Spanish government and the Marquis de Maison Rouge, examined, and held not to amount to a grant to him. *United States v. King*, 7 H. 833 . . . . xvii. 425.

21. A Spanish grant, which did not contain any description by which the land could be located, and was connected with no survey, did not create any private property, in any part of the public domain; such a title was not confirmed by the treaty of cession of Louisiana. *United States v. King*, 8 H. 773 . . . . xv. 640.

22. A Spanish grant, which contained no description or calls, except such as showed that the grantee was to have six miles square in a territory thirty miles by six, and which was aided by no legal survey, is void. *United States v. Lawton*, 5 H. 10 . . . . xvi. 286.

23. The survey not conforming, in part, to the grants, the decree for that part was reversed. *United States v. Levi*, 8 P. 479 . . . . xi. 182.

24. The survey not being wholly within the grant, decree for so much reversed. *United States v. Huertas*, 8 P. 488 . . . . xi. 187.

25. Decree of the district court of Florida confirmed so far as the survey was within the grant made by the Spanish authorities. *United States v. Huertas*, 9 P. 171 . . . . xi. 322.

26. The stipulation in the 8th article of the treaty with Spain avoids grants made after the 24th January, 1818, but not surveys made after that time to locate grants made before that time, although such grants contained no description of the place where they were to be located. *United States v. Acosta*, 1 H. 24 . . . . xiv. 483.

27. A paper extracted from a Spanish register of land titles in Louisiana, purporting to contain only the recitals which usually precede a Spanish title in form, but adding no words of grant, *held* not to be evidence of any title. *United States v. Le Blanc*, 12 H. 435 . . . . xix. 227.

28. No legislation of congress has cured a defect arising from want of power to make a French title, under which possession had not been held. *United States v. D'Autorive*, 10 H. 609 . . . . xviii. 516.

## 6. OF THE RELEASE, SURRENDER, OR FORFEITURE OF SUCH TITLES, AND HEREIN OF CONDITIONS.

1. Where a part of the land claimed under a Spanish title was granted to, and accepted by the claimant, by an act of congress, without any saving of the residue of his claim, this must be taken to have satisfied his whole claim upon the equity of the United States. *United States v. Roselius*, 15 H. 31 . . . . xx. 385.

2. There was no ordinance ingrafting a condition upon a mill grant. *United States v. Hanson*, 16 P. 196 . . . . xiv. 248.

3. A recital in a Spanish grant, of one of its considerations, will not be deemed

a condition, if it is not declared to be so, and if the grant is in terms absolute. *United States v. Rodman*, 15 P. 130....xiv. 50.

4. A grant of land by the Spanish governor of East Florida, to be void if a settlement should not be made within six months, is void as against the crown of Spain, and as against the United States, if the condition was not performed. *Buyck v. United States*, 15 P. 215....xiv. 74.

5. A grant of lands by the Spanish governor of East Florida, "in conformity with the number of workers he may have to cultivate them, the corresponding number of acres may be surveyed by him," and that "he will take possession within six months," no possession having been actually taken, and no survey made, and no workers placed on the land, is void. *O'Hara v. United States*, 15 P. 275....xiv. 86.

6. Though the perfect titles made by the Spanish authorities to lands in Florida, are exempt from the provisions of the 8th article of the treaty of cession between the United States and Spain, and need no confirmation, yet titles granted upon condition of cultivation, or occupation, not performed, and without excuse for non-performance, are void as against the United States, as they were against the king of Spain. *United States v. Wiggins*, 14 P. 334....xiii. 488.

7. Where a concession was made by the Spanish governor of Louisiana in 1799, and no survey was made and no possession taken, and no act done under it until it was produced in court, in 1846; *held*, that the incipient title must be presumed to have been extinguished. *United States v. Hughes*, 13 H. 1....xix. 849.

8. The previous decision affirmed, and applied to the facts of this case. *United States v. Hughes*, 13 H. 4....xix. 852.

9. The two previous decisions affirmed and applied to this case. *United States v. Hughes*, 13 H. 7....xix. 854.

10. A claim founded on a Spanish order of survey, no possession having been taken, and no survey made, nor any act done under the alleged title since 1791, when the order of survey was issued, held to have been abandoned and the inchoate title extinguished. *United States v. Simon*, 12 H. 433....xix. 225.

11. A claim under an alleged purchase from the Spanish authorities, held, upon the evidence, and the presumptions arising from the lapse of time and the surrounding circumstances, to have been extinguished, by the Spanish authorities before the cession of Louisiana to the United States. *United States v. Moore*, 12 H. 209....xix. 106.

12. A petition was presented to the governor of East Florida in 1816, stating that the petitioner desired to erect a mill, and for that purpose praying a grant of land of five miles square, or its equivalent, in the event that the situation named would not permit the said form. The grant was made as asked, to take effect on the erection of the mill. *Held*, 1. That under the treaty, the grantee had the same time to fulfil the condition after the cession, as was limited by an order of the governor made before the cession. 2. That as the whole quantity could not be surveyed at the place named, the residue was properly surveyed elsewhere. *United States v. Sibbald*, 10 P. 313....xii. 139.



13. A grant of land in East Florida, made by the local Spanish authorities, on a condition precedent, which was not performed, and no excuse shown for non-performance; *held*, that the title was invalid as against the United States. *United States v. Mill's Heirs*, 12 P. 215....xii. 699.

14. A grant of land in Florida, made by the local Spanish authorities, upon a condition precedent, which the grantee had not performed, and for the non-performance of which he gave no sufficient excuse, held invalid. *United States v. Kingsley*, 12 P. 476....xii. 804.

15. Though the commandant of the port of New Madrid, in upper Louisiana, had power, as the deputy of the Spanish governor of the province, to enter into a contract to grant lands in consideration of the introduction of a colony, &c., and though the facts set forth in his order as the motives of the agreement must be taken as true, yet, before the grantee could apply for a title in form, he must, according to the laws and usages of Spain, have complied with the conditions which formed the consideration of the grant; and as the United States have succeeded to the rights and duties of the Spanish crown, touching this subject, the applicant, who has failed to perform those conditions, cannot demand a title from the United States, under the act of May 26, 1824, (4 Stats. at Large, 52,) revived by the act of June 17, 1844, (5 Stats. at Large, 676.) *Glenn v. United States*, 13 H. 250....xix. 480.

16. The time allowed by the United States for performance of such conditions in grants of this character, did not run after the date of the act of March 26, 1804, (2 Stats. at Large, 287, § 14,) and it was competent for the political department of the government thus to limit the time. *Ib.*

17. The principles of the preceding case, *Glenn v. United States*, 13 H. 250, applied to this case, and the petition dismissed. *De Villmont's Heirs, v. United States*, 13 H. 261....xix. 489.

18. A condition to settle two hundred families on the land granted, was held to be a condition subsequent, and that, in equity, the change of jurisdiction and circumstances had excused its performance. *United States v. Arredondo*, 6 P. 391....x. 315.

## 7. OF LEGISLATIVE ACTS OF CONFIRMATION OF SUCH TITLES OPERATING DIRECTLY OR THROUGH COMMISSIONERS.

*Supra*, III. C.; *Infra*, IV. E.

1. The act of July 4, 1836, confirming claims to land in Missouri, (5 Stats. at Large, 126,) excepts from its operation lands previously confirmed by act of congress. *Les Bois v. Bramell*, 4 H. 449....xvi. 170.

2. The act of June 13, 1812, confirming commons, &c. in St. Louis, (2 Stats. at Large, 748,) excepted out of its operation only lands the claims where to had then been confirmed by the board of commissioners, organized under the act of March 2, 1805, (2 Stats. at Large, 324.) *Ib.*

3. One having an inchoate Spanish title to land in Missouri, who had neither presented it to any board of commissioners, nor to the district court, stood barred on May 26, 1829. *Ib.*

4. Under the acts of March 2, 1805, (2 Stats. at Large, 324,) and March 3, 1807, (2 Stats. at Large, 440,) relative to land titles in Louisiana, a confirma-



tion by commissioners does not necessarily enure to the benefit of the holder of the true French or Spanish title. And where the French owner twice conveyed, and possession went with the junior title, and its holder presented his claim, and it was confirmed, and the holder of the elder title wholly omitted to do any act under the laws of congress, it was held that he was entitled to no benefit therefrom. *Strother v. Lucas*, 6 P. 763 . . . . x. 367.

5. The act of May 26, 1824, (4 Stats. at Large, 66,) granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals, in using the terms, "new grant or order of survey by the Spanish government, during the time at which they had power to make the same," refers to grants made by the local authorities of Spain, after the acquisition of Louisiana by the United States, and before the cession of Florida, of lands lying between the Mississippi and Perdido rivers, and in dispute between the two governments. *Lessee of Pollard's Heirs v. Kibbe*, 14 P. 358 . . . . xiii. 497.

6. Such claims are not beyond the reach of congress, but may be, and in this case have been confirmed. *Ib.*

7. A mere private survey, made to enable the city of St. Louis to present its claim to commons before the board of commissioners under the act of March 2, 1805, (2 Stats. at Large, 324,) can have no influence on the title; it was not adopted by the act of confirmation of June 13, 1812, (2 Stats. at Large, 748,) which did not make confirmation with any reference to any private survey. *Mackay v. Dillon*, 4 H. 421 . . . . xvi. 165.

#### IV. CONFLICTING CLAIMS OF INDIVIDUALS TO PUBLIC LANDS.

##### A. CONFLICTING CLAIMS TO LEGAL TITLES ACQUIRED BY DIFFERENT PERSONS FROM THE UNITED STATES ALONE, OR FROM THEM AND A STATE OR A FOREIGN GOVERNMENT.

###### INDIANS, C. 2.

1. Where there were conflicting titles to the same land, one being a location under a New Madrid certificate, made in 1818, and confirmed by congress in 1822 and patented in 1827, and the other being an inchoate Spanish title, barred by failure to file notice of the claim pursuant to the act of March 2, 1805, (2 Stats. at Large, 324,) but the bar removed by the act of May 26, 1824, (4 Stats. at Large, 52,) and the title confirmed by a decree of this court after the patent issued for the first-mentioned title, it was *held*, that as the Spanish title was barred as against the United States, from 1808 to 1824, they might prescribe conditions for removing the bar, that they had done so; and that, by force of a limitation in the acts of 1824 and 1828, (4 Stats. at Large, 298,) the title acquired under the patent in 1827, and the equitable title which preceded the patent, were protected. *Barry v. Gamble*, 3 H. 32 . . . . xv. 279.

2. A patent which reserved the rights of settlers in the village of Peoria as granted by acts of May 15, 1820, (3 Stats. at Large, 605,) and March 3, 1823, (3 Stats. at Large, 786,) gave no title as against such a settler, who may recover the land, in an action of ejectment, against the patentee, though the settler's patent was of a subsequent date. *Ballance v. Forsyth*, 13 H. 18 . . . . xix. 362.

3. A patent from the United States does not affect a preëxisting title in a third person. *City of New Orleans v. De Armas*, 9 P. 223 . . . . xi. 338.

4. A donation certificate, under the act of March 3, 1803, (2 Stats. at Large, 229,) gives a title superior to that acquired by a purchase at a public land sale. *Ross v. Barland*, 1 P. 655 . . . . vii. 752.

5. No particular form of such certificate is required; it is sufficient if it shows the occupancy required by the act, and what land granted. *Ib.*

6. After May 26, 1829, and before July 9, 1832, lands in Missouri, to which imperfect French or Spanish titles existed, were not reserved from sale, and were liable to be appropriated to the use of that State under the authority of the act of March 6, 1820, (3 Stats. at Large, 545,) and a title acquired by such selection, and sold by virtue of the act of March 3, 1831, (4 Stats. at Large, 492,) is valid as against a subsequently confirmed Spanish title. *De-lauriere v. Emison*, 15 H. 525 . . . . xx. 618.

7. Construction of a special act of congress, of May 26, 1824, (4 Stats. at Large, 66,) granting certain lots of ground to the city of Mobile. *Mobile v. Eslava*, 16 P. 234 . . . . xiv. 267. *Mobile v. Hallett*, 16 P. 261 . . . . xiv. 284.

8. So long as the government held the title to the land demanded, there could be no adverse possession, to cause the statute of limitations to run. *Lindsay v. Miller*, 6 P. 666 . . . . x. 304.

9. A decree, confirming an inchoate Spanish title, made by this court, on appeal in 1836, upon a petition originally filed in 1824, did not relate back so as to divest a title gained from the United States under an entry made in 1834. This would be inconsistent with the second section of the act of May 24, 1828, (4 Stats. at Large, 298.) *McCabe v. Worthington*, 16 H. 86 . . . . xxi. 39.

## B. CONFLICTING CLAIMS TO EQUITABLE TITLES THUS ACQUIRED.

### *Infra*, IV. C.

1. On a trial at law, no inquiry can be made into the regularity of the pre-requisites of a patent, valid on its face. *Stringer v. Young's Lessee*, 3 P. 320 . . . . viii. 430.

2. If the defendant has the prior patent for land, the plaintiff can prevail in equity only by showing prior valid entries. *Hunt v. Wickliffe*, 2 P. 201 . . . . viii. 85.

3. A patent makes a title valid as against a subsequent entry. *Hoofnagle v. Anderson*, 7 W. 212 . . . . v. 248.

4. If the proceedings on which the patent was founded were irregular, the government, but not one having no prior equity, can take advantage thereof. *Ib.*

5. A mere right to enter on certain lands for military services, no particular land having been appropriated, is not such a prior equity as enables its holder to set aside a patent, regular on its face. *Ib.*

6. Though the warrant for military lands refers to the certificate, this reference does not amount to notice of an irregularity appearing on the certificate, and if the purchaser of such a warrant takes it subject to any infirmity on ac-

count of the irregularity of the certificate, his risk is terminated, and his title becomes good when the patent is issued. *Ib.*

7. Where a patent is founded on an assignment of a certificate of a military right, a court of equity may inquire into an alleged fraud in that assignment, and, if found fraudulent, decree the holder of the legal title to be a trustee for the equitable owner. *Brush v. Ware*, 15 P. 93 . . . .xiv. 34.

8. The act of the register in issuing a warrant under such a certificate, is ministerial, not judicial. *Ib.*

9. The treaty between the United States and Spain, of October 27, 1795, ascertained and established an existing but disputed boundary line; and prior grants, made by the authorities of Spain within the territory of Georgia, as ascertained by that treaty, were invalid, and owe all their force to the act of congress of March 3, 1803, (2 Stats. at Large, 229.) Consequently, the claimant, to whom the land was granted, in pursuance of that act, must prevail against any other claimant under a Spanish title, whether in a suit in equity or at law. *Robinson v. Minor*, 10 H. 627 . . . .xviii. 523.

10. A location under a New Madrid certificate cannot prevail against a subsequently confirmed Spanish concession, notice whereof had been given pursuant to the 10th section of the act of March 3, 1811. *Bissell v. Penrose*, 8 H. 317 . . . .xvii. 605.

11. A location and survey of a tract of land within the reservation made for Virginia military land warrants, made in contravention of the proviso to the 2d section of the act of congress of March 1, 1823, (3 Stats. at Large, 772,) is null and void, though the conflicting entry had been made in 1822, in the name of a person then deceased. *McArthur's Heirs v. Dun's Heirs*, 7 H. 262 . . . .xvii. 110.

12. Where the owner of land in Louisiana, fronting on the Mississippi River, obtained a patent certificate for back land, which he was not entitled to either by the act of any public surveyor, or by his equitable right to a protraction of his side lines;—*Held*, that his title was invalid as against an adjoining proprietor, who had a right to enter and purchase the land under the act of June 15, 1832, (4 Stats. at Large, 534,) and did so enter and purchase the same. *Jourdan v. Barrett*, 4 H. 169 . . . .xvi. 67.

13. The acts of March 3, 1811, (2 Stats. at Large, 662,) May 11, 1820, (3 Stats. at Large, 573,) and June 15, 1832, (4 Stats. at Large, 534,) concerning back and double concessions in Louisiana, as well as the Spanish regulations thereof, considered. *Ib.*

14. An equitable Spanish title not confirmed by the United States, cannot prevail against a legal title acquired from the United States. *United States v. King*, 3 H. 773 . . . .xv. 640.

15. Under the acts of 1812, (2 Stats. at Large, 748,) and 1824, (4 Stats. at Large, 65,) concerning town and village lots in Missouri, it was not competent for the recorder to give a certificate of confirmation in 1839, and thereby divest a title already acquired under the United States. *Gamache v. Piquignot*, 16 H. 451 . . . .xxi. 254.

16. An incomplete Spanish title, confirmed by congress in 1836, cannot prevail against a patent for the same land, issued before the act of July 4, 1836, (5 Stats. at Large, 126.) *Menard's Heirs v. Massey*, 8 H. 293 . . . .xvii. 591

## C. OF THE EQUITABLE TITLE THUS ACQUIRED BY ONE, AND THE LEGAL BY ANOTHER.

*Supra*, III. A. 6, C. 1, 8, IV. B.

## D. CONFLICTING RIGHTS AND CLAIMS WHICH ARE OR ARE NOT FIXED AND SETTLED BY THE LEGISLATIVE POWER, OR BY COMMISSIONERS OR OTHER OFFICERS UNDER THE AUTHORITY OF CONGRESS, AND NOT THE SUBJECT OF JUDICIAL INQUIRY.

1. Under the act of May 20, 1826, (4 Stats. at Large, 179,) granting lands for the support of schools, the secretary of the treasury had power to decide, as between the school trustees for a township and one claiming under a private entry, whether the land in question had been duly selected and set apart for the schools of the township; and his decision was final. *Campbell v. Doe*, 13 H. 244....xix. 477.

2. The commissioners under the act of 1803, (2 Stats. at Large, 229,) were empowered to hear evidence, as to the time of the evacuation by the Spanish troops, and to decide on the fact. *Ross v. Barland*, 1 P. 655....vii. 752.

3. Under the act of May 8, 1822, (3 Stats. at Large, 699, 708,) the register and receiver were not authorized to decide on conflicting locations or titles under perfect grants, but only where the titles were incomplete. *Doe v. City of Mobile*, 9 H. 451....xviii. 224.

4. Under the fifth section of the act of March 3, 1811, (2 Stats. at Large, 663,) prescribing the terms on which proprietors of contiguous lands, on a stream, in Louisiana, could obtain titles to adjacent back lands belonging to the United States, where each of two proprietors could not obtain his full quantity by reason of the directions of their side lines, a division between them of such back land, made, in good faith, by the principal deputy surveyor of the proper district, under the superintendence of the surveyor of public lands south of the State of Tennessee, was final and conclusive upon their respective rights, and cannot be disturbed by any court of justice. *Haydel v. Dufresne*, 17 H. 23....xxi. 347.

## CORPORATIONS, B. 4.

## PUBLIC LANDS OF THE SEVERAL STATES.

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## A. VIRGINIA AND KENTUCKY.

1. Under the land law of Virginia, if by any reasonable construction an entry is supportable, it will be supported. *Massie v. Watts*, 6 C. 148....ii. 345.

2. When a given quantity of land is to be laid off on a given base, it is to be in a parallelogram, unless this form would be repugnant to the entry; and where necessarily departed from, the departure should extend no further than the calls render necessary. *Ib.*

3. In Kentucky, if a natural object is called for, as about a certain distance from a fixed monument, and the object cannot be found, the call for it is rejected, and the distance mentioned taken as the precise distance. *Bodley v. Taylor*, 5 C. 191....ii. 228.

4. If an entry be placed on a road, at a certain distance from a given point, by which the road passes, the distance is to be computed by the meanders of the road, and not by a straight line, unless there is something to show another intent. If only the quantity and one line are described, the location is to be made in a square. *Ib.*

5. A call for the settlement and preëmption of J. before a location of the preëmption right of J. has been made, is substantially a call for the land of J. *Ib.*

6. In Kentucky, an entry is sufficient if it has that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own land on the adjacent residuum. *Ib.*

7. A survey, though it include surplus land, is an appropriation of the land it covers, and cannot be reduced by a *caveat*, under the act of Virginia, of 1779. The patent relates in equity to the inception of the title, and he who has first appropriated the land, has the best equitable title, unless impaired by the circumstances of the case. *Taylor v. Brown*, 5 C. 234....ii. 238.

8. A locator under a warrant, undertakes to find vacant land, and acts at his own risk. *Ib.*

9. The equity of the prior locator in Virginia extends to the surplus land surveyed, as well as to that included in the warrant. *Ib.*

10. If a subsequent locator has embraced in his patent, land included in a prior entry, he must convey the legal title thereof to such prior locator, without a conveyance from the latter, of lands held by him, not within his entry, but within that of the subsequent locator, but not surveyed as part thereof. *Bodley v. Taylor*, 5 C. 191....ii. 228.

11. Lord Fairfax, at the time of his death, had the absolute property, seisin, and possession of the waste and unappropriated lands in the northern neck of Virginia. *Fairfax's Devisee v. Hunter's Lessee*, 7 C. 603....ii. 684.

12. The commonwealth of Virginia could not grant the unappropriated lands in the northern neck until its title should have been perfected by possession; and the British treaty of 1794 confirmed the title to those lands in the devisee of Lord Fairfax. *Ib.*

13. Under the Virginia land-law of 1779, a survey without an entry was not an appropriation, and gave no title. *Wilson v. Mason*. 1 C. 45....i. 346.

14. The remedy by *caveat* belonged to one who obtained a better title after, as well as before another conflicting survey. *Ib.*

15. A military right to unappropriated land in America, acquired under a royal proclamation of 1763, was made assignable by the law of Virginia, to an inhabitant of that State. *Irvine v. Sims's Lessee*, 3 D. 425 . . . i. 298.

16. Obtaining a warrant and so locating it as to describe a particular parcel of land, gave to the assignee a complete equitable title, which was confirmed by the compact between Pennsylvania and Virginia. *Ib.*

17. A law of Virginia, passed in 1779, for opening a land-office, &c., contained a clause that no entry, or location of land, should be admitted within the country and limits of the Cherokee Indians. *Held*, that the tract west of the Tennessee River was not then within the limits of the country belonging to those Indians. *Kinney v. Olark*, 2 H. 76 . . . xv. 40.

18. The title to lands in Virginia, Kentucky, and Tennessee, could be tried under a *caveat*, and the judgment bound those who had a claim to an equitable title under one of the parties. *Ib.*

19. The courts of Kentucky having decided that an entry under a military warrant was necessary to give title, those claiming under such warrants, without entry, are barred by the act of limitations of Kentucky of seven years; for though that act does not bar those who claim by legislative grant, persons claiming under military warrants only obtained inchoate, and not complete titles from the legislature, and so are not within the exception. *Ib.*

20. Though the Kentucky act of 1809 could not have complete operation west of the Tennessee when it was passed, yet it did have such operation as soon as the restrictions imposed by treaty were removed. *Ib.*

21. The certificate of the surveyor that a survey has been made by virtue of a warrant, is sufficient evidence that the warrant was in his possession when the survey was made. *Taylor v. Brown*, 5 C. 234 . . . ii. 238.

22. Under the land law of Virginia, the title, if it commence without an entry, begins with the survey, and is not lost by the neglect of the surveyor to record the survey pursuant to the direction of the act of 1748. *Ib.*

23. The principal surveyor may make a legal return of a survey, from the field notes of his assistant who made the survey, and died before making a plat and certificate. *Ib.*

24. If it is practicable, by a reasonable construction of an entry, to include the whole quantity of land called for, it is to be included. *Croghan's Lessee v. Nelson*, 3 H. 187 . . . xv. 373.

25. The call to run one line parallel to another, if repugnant to the call for the quantity, may be disregarded, if the other calls, and that for quantity, sufficiently identify the land. *Ib.*

26. In Kentucky, a patent is a legal title; what precedes it is equitable only. *Green v. Liler*, 8 C. 229 . . . iii. 104.

27. In Kentucky, the courts of law will not look beyond the patent, but courts of equity will, and will give validity to the elder entry against an elder patent. *Finley v. Williams*, 9 C. 164 . . . iii. 312.

28. Between preëmption rights, the prior improvement will hold the land against a prior certificate, entry, survey, and patent. *Ib.*

29. It is not essential to an entry upon a preëmption warrant, that the entry



should, in terms, call for the improvement, although it must in fact include the improvement. *Ib.*

30. An entry calling for "the Big Blue Lick," will not support a survey and patent for land at the Upper Blue Lick, the Lower Blue Lick being generally called "the Big Blue Lick," although there may be other calls in the entry which seem to designate the Upper Blue Lick as the place intended. *Ib.*

31. The law of Kentucky requires, in the location of warrants for land, some general description designating the place where the particular object is to be found, and a description of the particular object itself. *Matson v. Hord*, 1 W. 180 . . . .iii. 489.

32. The general description must be such as will enable a person intending to locate the adjacent residuum, and using reasonable care and diligence, to find the object mentioned in that particular place, and avoid the land already located. *Ib.*

33. If the description will fit another place better, or equally well, it is defective. *Ib.*

34. "The Hunter's Trace, leading from Bryant's Station over to the waters of Hinkston, on the dividing ridge between the waters of Hinkston and the waters of Elkhorn," is a defective description, and will not sustain the entry. *Ib.*

35. A question of fact respecting the validity of the location of a warrant for land under the laws of Kentucky. *Taylor v. Walton*, 1 W. 141 . . . .iii. 496.

36. Under the land law of Virginia, a patent is a statute grant, which confers a seisin in deed, without an actual entry. So does a private conveyance of wild and unoccupied lands. *Green v. Liter*, 8 C. 229 . . . .iii. 104.

37. The land law of Virginia, which gives a right of preëmption to those who had marked and improved land before the year 1778, refers that right to the time when the improvement was made, and to the time of the passage of the act, and not to the time when the claim for such preëmption was made before the court of commissioners. *Simms v. Guthrie*, 9 C. 19 . . . .iii. 236.

38. If an entry be made by the assignee of a preëmption right, it will be good, although the name of the assignor be not mentioned in the entry, if the entry refer to the warrant, and if it mention an improvement, provided the place be described with sufficient certainty in other respects. *Ib.*

39. A question under a bill in chancery, to obtain from the defendants a conveyance of a tract of land, in Kentucky, held by them as the property of the original grantee, confiscated to the State, and claimed by the plaintiffs under an equity arising from a sale made by the original grantee of another tract of land, to which it was alleged he erroneously supposed himself legally entitled under the same warrant and survey. Bill dismissed. *Russell v. Trustees of the Transylvania University*, 1 W. 432 . . . .iii. 622.

40. In Kentucky, it is settled that a survey must be presumed to be recorded at the expiration of three months from its date; and that an entry dependent on it is entitled to all the notoriety which is possessed by the survey. *Elmendorf v. Taylor*, 10 W. 152 . . . .vi. 360.

41. Under the land law of Kentucky, it is necessary that the descriptive calls should designate the place so as to enable a subsequent locator of ordinary



intelligence to find the land by reasonable search. *M'Dowell v. Peyton*, 10 W. 454....vi. 474.

42. The locative calls in an entry must be so specific and so notorious in themselves, or by reference to those which are notorious, as to enable a subsequent locator to discover and identify them by using ordinary diligence. *Littlepage v. Fowler*, 11 W. 215....vi. 567.

43. An entry must describe the place with sufficient accuracy to be found and known by others, and in terms which will not fit other places equally well with that intended to be appropriated. *Taylor's Devisee v. Owing*, 11 W. 226....vi. 572.

44. A call for a location "in the fork of the first fork of Licking," is not satisfied by a location in the first fork of Licking. *Meredith v. Pickett*, 9 W. 573....vi. 191.

45. The land law of Virginia, of 1779, makes a preëmption warrant superior to a treasury warrant, whenever they interfere with each other, unless the holder of the preëmption warrant has forfeited that superiority, by failing to comply with some of the requisites of the law; one of which is, that he shall enter his warrant with the surveyor of the county within twelve months after close of the session at which the law was enacted; and on that period having expired, and being prolonged by successive acts, during which time there was one interval between the expiration of the law and the act of revival, the original right of the holder of the preëmption warrant was preserved, notwithstanding that interval, the entry of the holder of the treasury warrant not having been made during the same interval. *Stephens v. M'Cargo*, 9 W. 502....vi. 153.

46. Where the entry was in the following words: "D. P. enters 2,000 acres on a treasury warrant on the Ohio, about twelve miles below the mouth of Licking, beginning at a hickory and sugar-tree on the river bank, running up the river from thence 1,060 poles, thence at right angles to the same, and back for quantity," it was held that the call for a sugar-tree might be declared immaterial, and the location be sustained on the other calls. *Johnson v. Pannel's Heirs*, 2 W. 206....iv. 79.

47. The entry was decreed to be surveyed, beginning twelve miles below the mouth of Licking, on the bank of the Ohio, and running up that river 1,060 poles; which line was to form the base of a rectangular parallelogram, to include 2,000 acres of land. *Ib.*

48. An error in description is not fatal in an entry, if it cannot mislead a subsequent locator. *Shipp v. Miller's Heirs*, 2 W. 316....iv. 116.

49. It is a general rule, that when all the calls of an entry cannot be complied with, because some are vague or repugnant, the latter may be rejected or controlled by other material calls, which are consistent and certain. *Ib.*

50. Course and distance yield to known, visible, and definite objects; but they do not yield, unless to calls more material and equally certain. *Ib.*

51. It is a settled rule, that where no other figure is called for in an entry, it is to be surveyed in a square coincident with the cardinal points, and large enough to contain the given quantity, and that the point of beginning is deemed to be the centre of the base line of such square. *Ib.*

52. An entry calling to run about a north course for quantity, the word "about" is to be rejected, and the land is to run a due north course, having on each side of a due north line, drawn through the centre of the base, an equal moiety. *Ib.*

53. A call for a spring branch generally, or for a spring branch to include a marked tree at the head of such spring, is not a sufficiently specific locative call; and where further certainty is attempted to be given by a call for course and distance, and the course is not exact, and the distance called for is a mile and a half from the place where the object is to be found, the entry is void for uncertainty. *Ib.*

54. It is essential to the validity of a grant, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind. *Blake v. Doherty*, 5 W. 359....iv. 658.

55. But it is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed. *Ib.*

56. Natural objects called for in a grant may be proved by testimony not found in the grant, but consistent with it. *Ib.*

57. The following description, in a patent, of the land granted, is not void for uncertainty, but may be made certain by extrinsic testimony: "A tract of land in our middle district on the west fork of Cane Creek, the waters of Elk River, beginning at a hickory, running north 1,000 poles to a white oak, then east 800 poles to a stake, then south 1,000 poles to a stake, thence west 800 poles to the beginning, as per plat hereunto annexed doth appear." *Ib.*

58. The plat and certificate of survey annexed to the patent, and a copy of the entry on which the survey was made, are admissible in evidence for this purpose. *Ib.*

59. A general plan, made by authority, conformably to an act of the local legislature, may also be submitted with other evidence to the jury, to avail *quantum valere potest*, in ascertaining boundary. *Ib.*

60. But a demarcation, or private survey, made by direction of a party interested under the grant, is inadmissible evidence, because it would enable the grantee to fix a vagrant grant by his own act. *Ib.*

61. The opinion of this court in the same case, 9 C. 173, revised and confirmed. *M'Ivers Lessee v. Walker*, 4 W. 444....iv. 441.

62. It is essential to the validity of an entry, that the land intended to be appropriated should be so described as to give notice of the appropriation to subsequent locators. *Johnson v. Pannel's Heirs*, 2 W. 206....iv. 79.

63. In taking the distance from one point to another on a large river, the measurement is to be with its meanders, and not in a direct line. *Ib.*

64. In ascertaining a place to be found by its distance from another place, the vague words "about" or "nearly," and the like, are to be rejected if there are no other words rendering it necessary to retain them; and the distance mentioned is to be taken positively. *Ib.*

65. Entries made in a wilderness, most generally referring to some prominent and notorious natural object, which may direct the attention to the neighborhood in which the land is placed, and then to some particular object exactly describing it; the first of these is denominated the general or descriptive call,

and the last, the particular or locative call of the entry. Reasonable certainty is required in both ; if the descriptive call will not inform a subsequent locator in what neighborhood he is to search for the land, the entry is defective, unless the particular object is one of sufficient notoriety. If, after having reached the neighborhood, the locative object cannot be found within the limits of the descriptive call, the entry is also defective. A single call may, at the same time, be of such a nature (as, for example, a spring of general notoriety) as to constitute within itself both a call of description and of location ; but if this call be accompanied with another, such as a marked tree at the spring, it seems to be required that both should be satisfied. *Ib.*

66. The call for an unmarked tree of a kind which is common in the neighborhood of a place sufficiently described by the other parts of the entry to be fixed with certainty, may be considered as an immaterial call. *Ib.*

67. The act of Kentucky of 1797, allowing to infants and *femes covert* three years after their several disabilities are removed, to complete surveys on their entries ; if any one or more of the joint owners be under the disability of infancy or coverture, it brings the entry within the saving of the proviso as to all the other owners. *Shipp v. Miller's Heirs*, 2 W. 316....iv. 116.

68. It is not a statute of limitations simply, but saves a forfeiture to the government, and so is to be construed strictly against the State. *Ib.*

69. The rule which prevails in Kentucky and Ohio, as to land titles is, that, at law, the patent is the foundation of title, and neither party can bring his entry before the court ; but a junior patentee, claiming under an elder entry, may, in equity, support his equitable title. *M'Arthur v. Browder*, 4 W. 488....iv. 448.

70. A description which will identify the lands, is all that is necessary to the validity of the grant : but the law requires that an entry should be made with such certainty, that subsequent purchasers may be enabled to locate the adjacent residuum. *Ib.*

71. If under the Virginia land law, the warrant must be lodged in the office of the surveyor, at the time, when the survey was made, his certificate stating that the survey was made by virtue of the governor's warrant, and agreeably to the royal proclamation of 1763, is sufficient evidence that the warrant was in his possession at that time. *Craig v. Bradford*, 3 W. 594....iv. 305.

72. The 6th section of the act of Virginia, of 1748, entitled, "An act directing the duty of surveyors of lands," is merely directory to the officer, and does not make the validity of the survey depend upon his conforming to its requisitions. *Ib.*

73. A survey made by the deputy surveyor is, in law, to be considered as made by the principal surveyor. *Ib.*

74. An entry under the land law of Virginia held void for want of certainty. *Perkins v. Ramsey*, 5 W. 269....iv. 622.

75. The surveys actually made on the military land warrants of Virginia, have not the force of judicial acts, or of acts done by the deputations of officers as general agents of the continental officers. *Kerr v. Watts*, 6 W. 550....v. 160.

76. Under the act of assembly of Virginia, of October, 1783, for the better locating and surveying the lands given to the officers and soldiers on continental

and state establishments, the State of Virginia has no right to call upon the person who was appointed one of the principal surveyors, to account for the fees received by him, of one dollar for every hundred acres, on delivering the warrants, towards raising a fund for the purpose of supporting all contingent expenses; the bill filed by the attorney-general of the State, to compel an account, not sufficiently averring the want of any proper private parties *in esse* to claim it. *Nicholas v. Anderson*, 8 W. 365....v. 447.

77. The register of the land-office in Virginia, in issuing a warrant for military services, acted ministerially, and the grounds of his action were open for examination, at least until a patent was issued. *Miller v. Kerr*, 7 W. 1....v. 191.

78. A warrant and survey do not constitute a legal title. *Ib.*

79. A patent for lands, in Kentucky, which declares that "the lands entered for J. and P. are within the same bounds, but both the said claims have been excluded in the calculation of the plot," gives the patentee no title to the land entered for J. and P., but this is valid for the residue. *Scott's Lessee v. Ratliffe*, 5 P. 81....ix. 235.

79a. Construction of certain entries and surveys in Kentucky. *Holmes v. Trout*, 7 P. 171....x. 442.

80. A call for a survey, which had not acquired notoriety, will not of itself support an entry; but if the survey called for has been made conformably to a valid entry, such a call may be good. *Ib.*

81. Surplus land does not vitiate a survey, in Kentucky. *Ib.*

82. To constitute a valid entry of land in Kentucky, some one or more leading calls must be notorious, so that an inquirer, by reasonable diligence, may find the land, and if the leading call is uncertain, and the entry supplies no means of controlling it or rendering it certain, the entry is void. *Garnett v. Jenkins*, 8 P. 75....xi. 28.

#### B. NORTH CAROLINA AND TENNESSEE. (INDIANS, C. 1.)

1. In Tennessee, the effect of entries, as well as their dates, is to be considered, and it does not follow that an entry is to be preferred merely because it is prior in time. *Blunt's Lessee v. Smith*, 7 W. 248....v. 259.

2. This law is applicable to military grants. *Ib.*

3. Though mistakes in surveys may be corrected, this cannot be allowed to affect a subsequent adjoining enterer. *Ib.*

4. To constitute a special entry in Tennessee, such objects must be called for that a majority of those acquainted with the neighborhood at its date, could, with reasonable diligence, find the location; but it was not necessary that the survey should be notorious. *Ib.*

5. A patent for lands in Tennessee, issued upon a survey and plat, returned as if actually surveyed, must be treated as if the survey returned had been actually made, though no actual survey was made. *Newsom v. Pryor's Lessee*, 7 W. 7....v. 194.

6. A call for a natural object, in such a survey, controls both course and distance. *Ib.*

7. And this, whether the object called for be in the course of the line, or at the end of the line. *Ib.*

8. A question relative to the title of the late Major-General Nathaniel Greene, to 25,000 acres of land given to him, within the bounds of the land reserved for the use of the army, by the 10th section of the act of the legislature of North Carolina, passed in 1782, as a mark of the sense entertained by that State of his eminent services. *Rutherford v. Greene's Heirs*, 2 W. 196....iv. 73.

9. Under the laws of North Carolina, the first grant under a duplicate warrant was valid. *Blackwell v. Patton*, 7 C. 471....ii. 626.

10. In Tennessee, the younger patent on the elder entry prevails over the elder patent on the younger entry. *Polk's Lessee v. Wendell*, 9 C. 87....iii. 276.

11. A patent justifies a presumption that all the previous requisities of the law have been complied with. *Ib.*

12. A patent is void at law if the State had no title, or if the officer who issued the patent had no authority so to do. *Ib.*

13. In North Carolina, the want of an entry nullifies a patent. *Ib.*

14. After the cession of land by North Carolina to the United States, the former had no right to grant those lands to any other grantee who had not an incipient title before the cession. The question, whether such incipient title existed, is therefore open at law. *Ib.*

15. The act of assembly of North Carolina, of November, 1777, establishing offices for receiving entries of claims for lands in the several counties of the state, did not authorize entries for lands within the Indian boundary, as defined by the treaty of the Long Island of Holston, of the 20th of July, 1777. The act of April, 1778, is a legislative declaration explaining and amending the former act, and no title is acquired by an entry contrary to these laws. *Preston v. Browder*, 1 W. 115....iii. 485.

16. The act of assembly of North Carolina, passed between the years 1783 and 1789, avoids all entries, surveys, and grants of lands set apart for the Cherokee Indians. *Danforth's Lessee v. Thomas*, 1 W. 155....iii. 504.

17. The boundaries of the reservation have been altered by successive treaties with the Indians; but the mere extinguishment of their title did not subject the land to appropriations, unless expressly authorized by the legislature. *Ib.*

18. Where the plaintiff in ejectment claimed title to lands in the State of Tennessee, under grant from said State, dated the 26th of April, 1809, founded on an entry made in the entry taker's office of Washington county, dated the 2d of January, 1779, in the name of J. M'Dowell, on which a warrant issued on the 17th of May, 1779, to the plaintiff, as the assignee of J. M'Dowell; and the defendants claimed under a grant from the State of North Carolina, dated the 9th of August, 1787, it was determined, that the prior entry might be attached to a junior grant, so as to overreach an elder grant; and that a survey having been made, and a grant issued upon M'Dowell's entry in the name of the plaintiff, calling him assignee of M'Dowell, was *prima facie* evidence that the entry was the plaintiff's property; and that a warrant is sufficiently certain to be sustained, if the objects called for are identified by the testimony, or unless the calls would equally well suit more than one place. *Ross v. Reed*, 1 W. 482....iii. 643.

19. The act of North Carolina, 1783, c. 2, opening the land-office, did not

prohibit a person from making several different entries, amounting in the whole to more than 5,000 acres, nor from purchasing the rights acquired by others by entries, nor from uniting several entries in one survey and patent; and such union of several entries is allowed by the act of 1784, c. 19. *Polk's Lessee v. Wendell*, 9 C. 87....iii. 276.

20. In a patent, the obliteration of the consideration, without fraud, does not make void the grant. *Ib.*

21. If there is nothing in a patent to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to magnetic meridian. *M'Iver's Lessee v. Walker*, 9 C. 173....iii. 317.

22. Course and distance must yield to a call for natural objects. *Ib.*

23. If a patent refer to a plat annexed, and if, in that plat, a watercourse be laid down as running through the land, the tract must be so surveyed as to include the watercourse, and to conform as near as may be to the plat, although the lines thus run do not correspond with the courses and distances mentioned in the patent, and although neither the certificate of survey, nor the patent, calls for that watercourse. *Ib.*

24. A grant from a State, of land lying partly within the Indian boundary, and for that cause invalid as to that part of the land, may be valid as to the residue, even though it was extended over the Indian boundary, by means of deception practised on the officer making the grant. *Winn v. Patterson*, 9 P. 663....xi. 516.

25. A question whether the French Lick reservation had been subjected to appropriation, by entry and survey, as vacant land, by statute of North Carolina or Tennessee. *Edwards's Lessee v. Darby*, 12 W. 206....vii. 126.

26. The acts of assembly of North Carolina, passed between the years 1788 and 1789, invalidate all entries, surveys, and grants of land within the Indian territory, which now forms a part of the territory of the State of Tennessee. But they do not avoid entries commencing without the Indian boundary and running into it, so far as respects that portion of the land situate without their territory. *Danforth v. Wear*, 9 W. 678....vi. 229.

27. The act of North Carolina of 1784, authorizing the removing of warrants which had been located upon lands previously taken up, so as to place them upon vacant lands, did not repeal by implication the previously existing laws, which prohibited surveys of land within the Indian boundary. The lands to which such removals are made, must be lands previously subjected to entry and survey. *Ib.*

28. There are cases in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant, &c. In such cases, the validity of the grant is necessarily examinable at law. *Polk's Lessee v. Wendell*, 5 W. 293....iv. 632.

29. A grant raises a presumption that every prerequisite to its issuing was complied with, and a warrant is evidence of the existence of an entry; but where the entry has never in fact been made, and the warrant is forged, no right accrues under the act of North Carolina of 1777, and the grant is void. *Ib.*

30. Where a party, in order to prove that there were no entries to authorize the issuing of the warrants, offered to give in evidence certified copies of war-



rants from the same office, of the same dates and numbers, but to different persons, and for different quantities of lands : *Held*, that this was competent evidence to prove the positive fact of the existence of the entries specified in the copies ; but that, in order to have a negative effect in disproving the entries alleged to be spurious, the whole abstract ought to be produced in court, or inspected under a commission, or the keeper of the document examined as a witness, from which the court might ascertain the fact of the non-existence of the contested entries. *Ib.*

81. In such a case, certificates from the secretary's office of North Carolina, introduced to prove that on the entries of the same dates with those alleged to be spurious, other warrants issued, and other grants were obtained in the name of various individuals, but none to the party claiming under the alleged spurious entries, is competent circumstantial evidence to be left to the jury. *Ib.*

82. In such a case, parol evidence, that the warrants and locations had been rejected by the entry-taker as spurious, is admissible. *Ib.*

83. It seems that, whether a grant be absolutely void, or voidable only, a junior grantee is not, by the law of Tennessee, permitted to avail himself of its nullity, as against an innocent purchaser without notice. *Ib.*

#### COMPACTS OF STATES, 11.

### C. PENNSYLVANIA.

1. Under the act of Pennsylvania, of April 8, 1792, the grantee by warrant, who was prevented by force of the enemies of the United States, from making an actual settlement on the land, from the date of the warrant to January 1, 1796, but who persisted in his endeavors to make such settlement, is excused from making such actual settlement, and has a fee-simple in the lands, though he did not make improvements within two years after such cause of prevention ceased. *Huidekoper's Lessee v. Douglass*, 3 C. 1 . . . i. 528.

2. A survey in Pennsylvania, and payment of the consideration, gave a legal right of entry, which supports an ejectment. This right remains legal, though it may have originally been held, so from a defect of equitable powers, and though the courts of the United States now possess those powers. *Irvine v. Sims's Lessee*, 8 D. 425 . . . i. 298.

### D. GEORGIA.

1. The lands in question, in this case, did belong to the State of Georgia, and not to Carolina, or the United States. *Fletcher v. Peck*, 6 C. 87 . . . ii. 828.

2. An unextinguished Indian title to these lands, was not absolutely inconsistent with a seisin in fee by the State. *Ib.*

3. Where both parties claimed title under the State of Georgia, the practical construction put by the State upon a treaty between the State and a tribe of Indians, should be followed. *Patterson v. Jenks*, 2 P. 216 . . . viii. 92.

4. Under the laws of Georgia, though so much of a grant as lay within the Indian country was void, the residue was valid. *Ib.*



## QUO WARRANTO.

5. In general, the validity of a patent for lands can only be impeached for causes anterior to its being issued, in a court of equity. But where the grant is absolutely void upon its face, or where the State has no title, or the officer has no authority to issue the grant, the validity of the grant may be contested at law. *Patterson v. Winn*, 11 W. 380....vi. 632.

6. The laws of Georgia, in the year 1787, did not prohibit the issuing of a patent to any one person for more than 1,000 acres of land. The proviso in the act of assembly of the 17th of February, 1788, limiting the quantity to that number, is exclusively confined to head-rights. *Ib.*

## E. OHIO.

1. An entry for 1,000 acres of land in Ohio, on Deer Creek, "beginning where the upper line of Ralph Morgan's entry crosses the creek, running with Morgan's line on each side of the creek 400 poles, thence up the creek 400 poles in a direct line, thence from each side of the given line with the upper line at right angles with the side lines for quantity:" *held*, to be a valid entry. *M'Arthur v. Browder*, 4 W. 488....iv. 448.

2. An amended entry retains its original character, so far as it is not altered; so far as it is altered, it is a new entry. *Ib.*

3. An entry of land made in the name of a person who was dead at the time of the entry, is a nullity in the State of Ohio. *M'Donald's Heirs v. Smalley*, 6 P. 261....x. 109.

*Supra*, A. 69.

## PUNCTUATION.

Punctuation is a most fallible standard by which to interpret a writing. *Ewing v. Burnet*, 11 P. 41....xii. 328.

## QUO WARRANTO.

An information for a *quo warranto*, to try the title to an office, cannot be maintained, but at the instance of the government; and the consent of parties will not give jurisdiction in such a case. *Wallace v. Anderson*, 5 W. 291....iv. 632.

## REASONABLE TIME, PLACE, &amp;c.

BILLS, &c. G. 4, 11, 12; JURY, A.

RECAPTURE.

ADMIRALTY, A. 1; SALVAGE, C.

RECEIVER.

EQUITY, C. 11.

RECEIVERS AND DISBURSERS OF PUBLIC MONEY.

BOND, C.; PRIORITY OF PAYMENT OF THE UNITED STATES.

- A. WHO WITHIN THE ACTS OF CONGRESS, 445.
- B. TREASURY WARRANTS, AND JURISDICTION AND PROCEEDINGS  
IN REFERENCE THERETO, 445.
- C. ACTIONS AND SUITS AGAINST THEM AND THEIR SURETIES, 446.
  - 1. EVIDENCE, AND HEREIN OF TREASURY TRANSCRIPTS.
  - 2. SET-OFF AND CREDITS.
  - 3. WHAT ACTIONS LIABLE TO, AND FORM OF DECLARING.
  - 4. EXTENT OF LIABILITY OF PRINCIPAL AND SURETIES, AND WHAT  
DEFENCES THEY MAY MAKE.

A. WHO WITHIN THE ACTS OF CONGRESS.

- 1. The act of May 7, 1822, (3 Stats. at Large, 697,) requires security of a surveyor of public lands, appointed under the act of April 29, 1816, (3 Stats. at Large, 325,) *Farrar v. United States*, 5 P. 373....ix. 386.
- 2. Such a surveyor is a disburser of public money. *Ib.*

B. TREASURY WARRANTS, AND JURISDICTION AND PROCEEDINGS  
IN REFERENCE THERETO.

Under the act of May 15, 1820, §§ 3, 4, (3 Stats. at Large, 594,) the district court has jurisdiction to enjoin, in part or in whole, the execution of a treasury warrant of distress, whether the person complaining was or was not an officer against whom such a warrant might lawfully be issued; its decision is final, and bars an action on the account which formed the subject-matter of the warrant and of the bill of complaint. *United States v. Nourse*, 9 P. 8...xi. 268.

APPEAL, A. 2.

## C. ACTIONS AND SUITS AGAINST THEM AND THEIR SURETIES.

## BOND, C. G.

## 1. EVIDENCE, AND HEREIN OF TREASURY TRANSCRIPTS.

## EVIDENCE, B. 2.

1. The legislature may establish new rules of evidence in derogation of the common law, as by making treasury transcripts evidence; but the mode of authentication must be strictly pursued. *Smith T. v. United States*, 5 P. 292....ix. 347.

2. Construction of a certificate of authentication. *Ib.*

3. The signature of the secretary of the treasury is not necessary; it is the seal of the department which gives authenticity to the certificate. *Ib.*

4. Two kinds of transcripts are provided for: the first from the books, the second from bonds, contracts, &c., which remain on file, and relate to or are connected with any settlement. *Ib.*

5. A treasury transcript, which is a substantial copy of the quarterly returns of a collector of customs, revised and corrected by the accounting officers of the treasury, is evidence, under the act of March 3, 1797, (1 Stats. at Large, 512;) and it is no objection that they contain charges which are the aggregates of items rendered by the collector in his quarterly abstracts, references to those abstracts being made, and they not having been called for at the trial. *Hoyt v. United States*, 10 H. 109....xviii. 315.

6. Under the 2d section of the act of March 3, 1797, (1 Stats. at Large, 513,) there should be annexed to the treasury transcript duly certified copies of the vouchers under which payments were made to third persons by the authority of the defendant; that authority not being otherwise within the personal knowledge of the accounting officers. *United States v. Jones*, 8 P. 375....xi. 132.

7. It is in the discretion of the court to require the production of the originals, where fraud is alleged. *Ib.*

8. This act requires a transcript of the items, not a statement of a balance in gross. *Ib.*

9. A defendant may avail himself of the credits contained in the transcript, and at the same time object that items of debit therein are not proper subjects of a treasury certificate, and not duly proved thereby. *Ib.*

10. An account stated at the treasury department, and certified under the act of March 3, 1797, (1 Stats. at Large, 512,) is evidence only of items for moneys which are disbursed through the ordinary channels known officially to the accounting officers, and appearing on their books. *United States v. Buford*, 3 P. 12....viii. 266.

11. Though a treasury transcript, merely stating balances, is not evidence under the act of March 3, 1797, § 2, (1 Stats. at Large, 512,) yet if the whole transcript taken together does contain the items, so as to show how the balances were struck and of what items composed, it is sufficient. *Gratiot v. United States*, 15 P. 336....xiv. 106.

12. A treasury transcript, showing indebtedness, though *prima facie* evidence, may be reformed by other evidence, which proves that he is charged with moneys which were not received by him during the particular term to which the liability of the sureties sued in that action extends, or that moneys, paid by him to the government, were received by him during that term, and so must be credited against charges made to him during that term. *United States v. Eckford's Executors*, 1 H. 250....xiv. 592.

13. Under the act of March 3, 1797, § 2, (1 Stats. at Large, 512,) a treasury transcript of an account of an Indian agent, adjusted and certified by the proper officers, is evidence, as against him and his sureties, that he received the several sums of money therein charged to him as received in the regular and usual course of the business of the department, without the production of copies of his receipts therefor. *Bruce v. United States*, 17 H. 437....xxi. 596.

14. A copy of an official bond, duly authenticated according to the act of congress of July 2, 1836, § 15, (5 Stats. at Large, 82,) is admissible in evidence. *United States v. Wilkinson*, 12 H. 246....xix. 118.

15. Under the 8th and 15th sections of the act of July 2, 1836, (5 Stats. at Large, 81, 82,) transcripts of the quarterly returns of a postmaster, as corrected by the auditor, and of the accounts based thereon, are admissible in evidence in an action against the postmaster and his sureties on his official bond, though credits claimed by him and rejected, do not appear in such accounts. *United States v. Hodge*, 13 H. 478....xix. 603.

16. Under the 2d and 4th sections of the act of March 3, 1797, (1 Stats. at Large, 512,) a certified transcript from the books of the treasury is admissible, in evidence, in an action by the United States against an accounting officer; and he is not entitled to claim any credits not provided for by that act, though no previous proceedings have been had against him under the act of March 3, 1795, (1 Stats. at Large, 441,) and he is not declared against in his official capacity. *Walton v. United States*, 9 W. 651....vi. 220.

17. A treasury transcript is admissible in evidence for a surety to prove the date of a payment credited in the account. *Cox v. United States*, 6 P. 172....x. 83.

18. The recital of an appointment in a bond, estops the obligors from denying it, and it is not necessary to produce the commission of the officer or its copy. *Bruce v. United States*, 17 H. 437....xxi. 596.

19. The accounts rendered to the government by an officer, do not conclude his sureties; they may show he has charged himself with moneys he never received. *United States v. Boyd*, 5 H. 29....xvi. 290.

## 2. SET-OFF AND CREDITS.

1. The United States have the right to apply moneys due to an officer for pay and emoluments to extinguish a debt due from him to the United States *Gratiot v. United States*, 15 P. 336....xiv. 106.

2. The claim being partly for money and partly for stock, received by the defendant, and the action for money had and received, and the verdict for less

than the money claim, the court presumed the claim for stock was extinguished by credits. *Walton v. United States*, 9 W. 651 . . . vi. 220.

3. Under the act of March 3, 1797, (1 Stats. at Large, 512,) the defendant cannot have a continuance to enable him to present claims for credits to the treasury; but, under the 4th section, he may have the jury pass upon claims rejected after the institution of the suit, or which he was prevented from exhibiting for allowance, as is therein provided. *United States v. Hawkins*, 10 P. 125 . . . xii. 40.

4. No debtor of the United States can, at the trial, set off a claim for a debt due to him by the United States, unless such claim shall have been submitted to the accounting officers of the treasury and by them rejected, except in the cases of accident, inability, and absence, provided for by the statute. *United States v. Giles*, 9 C. 212 . . . iii. 389.

5. Under the act of March 3, 1797, §§ 3, 4, (1 Stats. at Large, 514,) an item of credit may be set off in an action by the United States, whether the claim be legal or equitable. *Gratiot v. United States*, 15 P. 386 . . . xiv. 106.

6. Under the 3d and 4th sections of the act of the 3d of March, 1797, (1 Stats. at Large, 514,) the defendant is entitled, at the trial, to the benefit of any credit in his favor, whether arising out of the particular transaction for which he was sued, or out of distinct and independent transactions, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. *United States v. Wilkins*, 6 W. 135 . . . v. 38.

7. Under the act of April 20, 1818, (3 Stats. at Large, 466,) a receiver of public moneys is entitled to calculate his commission on public moneys received by him during the year commencing with the date of his commission, and not during the calendar, or fiscal year; and he may retain, not exceeding \$2,500, for the fraction of a year, when he goes out of office. *United States v. Dickson*, 15 P. 141 . . . xiv. 54.

8. A navy agent, who, without a regular requisition, pays claims for a purser, and permits him to obtain allowances at the treasury for such payments, without a credit to the navy agent, and a charge to himself, must look to the purser for his indemnity. *United States v. Hawkins*, 10 P. 125 . . . xii. 40.

9. The courts may allow to a clerk in a department, by way of offset, an equitable claim, for services rendered to the government under the orders of the head of the department, though there be no act of congress providing for the case, and an auditor of the treasury could not allow the claim. (5 Stats. at Large, 349, § 3; 510, § 2.) *United States v. Macdaniel*, 7 P. 1 . . . x. 376.

10. For extra services performed by a military officer under the sanction of the government under circumstances of peculiar emergency, the courts may allow a reasonable compensation by way of off-set. *United States v. Ripley*, 7 P. 18 . . . x. 382.

11. A person appointed secretary of the board of commissioners of the navy hospital fund, to execute "such duties as may be required of him by the board," for a stated salary, and who performs other services at the request of the board, with the understanding that he is to be paid therefor such a commission as has been usually paid for similar services, is entitled to a credit, according to that understanding by way of off-set in an action against him by the United States. *United States v. Fillebrown*, 7 P. 28 . . . x. 386.

12. A claim for unliquidated damages, or a claim of which the defendant has become the equitable owner by assignment, cannot be allowed as credits in an action by the United States against a receiver of public money; and the practice of the state courts, or the provisions of state laws, can have no effect thereon. *United States v. Robeson*, 9 P. 319....xi. 371.

13. The act of March 3, 1797, (1 Stats. at Large, 514, 515, §§ 3, 4,) allowing offsets in suits by the United States, does not extend to claims for unliquidated damages. *United States v. Buchanan*, 8 H. 83....xvii. 509.

PAYMENT, A. 5, 6; C, 6; SET-OFF, A. 2.

### 3. WHAT ACTIONS LIABLE TO, AND FORM OF DECLARING.

1. The act of March 3, 1795, for the recovery of debts due to the United States, (1 Stats. at Large, 441,) is repealed, by implication, by the acts of March 3, 1797, (1 Stats. at Large, 512,) and March 3, 1817, (3 Stats. at Large, 366.) *Smith, T. v. United States*, 5 P. 292....ix. 347.

2. A count which avers that an accounting officer received public moneys during his continuance in office, is not good as against a surety who became such some time after he had entered on his office, there being no allegation that the moneys, received before the defendant became surety, were in the hands of the officer at the time the defendant became surety and were not accounted for afterwards. *United States v. Linn*, 1 H. 104....xiv. 510.

ASSUMPSIT, C. 4; CONTRACT, A. 7.

### 4. EXTENT OF LIABILITY OF PRINCIPAL AND SURETIES, AND WHAT DEFENCES THEY MAY MAKE.

CONSTITUTIONAL LAW, C. 2; LACHES; SURETIES; UNITED STATES, B.

1. Sureties are not to be made liable for defaults of their principal occurring before the date of their bond, the language whereof is prospective, simply because the bond recites the appointment to office and gives the date of the commission. *United States v. Boyd*, 15 P. 187....xiv. 68.

2. Regulations requiring periodical settlements are directory merely, and cannot be availed of by the sureties of an officer. *Ib.*

3. Though moneys were received by the principal, before the date of the bond, if he held them in trust for the United States at its date, and failed to account for them afterwards, this is a breach of a bond, conditioned for the faithful execution of the duties of the office. *Ib.*

4. Under the act of May 15, 1820, (3 Stats. at Large, 582,) which limits the term of office of a collector of customs to four years, his holding, under each term, is as separate and distinct, so far as concerns sureties on his official bond, as if the office, during these different terms, were held by different persons. *United States v. Eckford's Executors*, 1 H. 250....xiv. 592.

5. Sureties, on the official bond of a collector, are liable for his misapplication of moneys received during the term of four years, for which he was appointed when they signed his bond, but not for the misapplication of moneys received prior or subsequent to that appointment. *Ib.*

6. If a balance was due from an officer when reappointed, the presumption is that it was then in his hands, and if so his sureties, on his reappointment, are responsible for its due application. But they may relieve themselves, by showing that he was in fact a defaulter when they became his sureties. *Bruce v. United States*, 17 H. 437 . . . . xxi. 596.

7. A collector of the customs cannot exempt himself from a charge by showing that the money received by him, in payment of duties, was counterfeit. That was at his risk. *United States v. Morgan*, 11 H. 154 . . . . xviii. 580.

8. If cancelled treasury notes are stolen from him, he is liable, on his bond, for any actual damage sustained by the government from their loss, though he used due diligence in their custody. *Ib.*

9. To an action of debt on a bond of a receiver of public moneys, conditioned that he would faithfully execute the duties of his office, it is a bad plea by the sureties that, after breach, another bond was accepted in satisfaction of the first, or that the principal falsely pretended to have received the money in question, and gave receipts therefor, and returned the same to the treasury department, when in fact he had not received the same. *United States v. Girault*, 11 H. 22 . . . . xviii. 585.

10. This last plea distinguished from the defence in *United States v. Boyd*, 5 How. 29. *Ib.*

11. It is not a defence to an action on the official bond of a receiver of public moneys, conditioned to keep safely the public moneys collected by him, that the money was feloniously stolen, without any fault on his part. *United States v. Prescott*, 3 H. 578 . . . . xv. 559.

12. If a receiver can purchase the public lands, the money must be paid over by him, and deposited as the money of the government, as if paid to him by third persons; and where he makes such purchases before giving a bond, his sureties, on a bond afterwards given, are not liable for his failure ever to have had that money in his character as receiver. *United States v. Boyd*, 5 H. 29 . . . . xvi. 290.

## RECITALS.

### ESTOPPEL, A.

If one, having the legal title to land, recites in a deed that the conveyance is made pursuant to a decree, it is not necessary to produce the decree. *Games v. Stiles*, 14 P. 322 . . . . xiii. 479.

## RECORD.

### JURISDICTION, A. c. 4; RETURN.

1. A paper found on the files of the court in a case, purporting to show how notice was given in that case, but contradicting the entry on the record that due



notice was given, is not a part of the record, nor entitled to any effect. *Sargeant v. State Bank of Indiana*, 12 H. 371 . . . .xix. 190.

2. A certificate of the clerk that a document was read at the trial, does not make that document part of the record. *Fisher's Lessee v. Cockerell*, 5 P. 248 . . . .ix. 818.

## RECORDS, &c. OF OTHER STATES.

CONSTITUTIONAL LAW, E.; EVIDENCE, G. 2.

## RE-ENTRY.

LEASES AND TERMS FOR YEARS.

## REGISTRATION.

CONFLICT OF LAWS, H.; DEED, D.; SHIPPING, A.; WILL, A. 3.

A will, rightly registered, may be put in evidence, whether the registration was before or after the institution of the suit. *Poole v. Fleeger*, 11 P. 185 . . . xii. 395.

## REHEARING.

JUDGMENTS, &c. A.; PRACTICE, L. D;

## RELATION.

Where an imperfect Spanish title was seized and sold on execution in conformity with the local law of the Missouri territory, while proceedings were pending before a board of commissioners, and the perfect title was subsequently granted by patent to the debtor, pursuant to the decision of the board, it enured to the benefit of the purchaser of the imperfect title, both by the doctrine of relation, applicable to such a case, and because, the patentee, being dead at the date of the patent, under the act of congress of May 20, 1836, (5 Stats. at Large, 81,) the purchaser had a better title than the devisees of the patentee. *Landes v. Brant*, 10 H. 348 . . . .xviii. 418.

## RELEASE.

1. If a settlement of an account is the consideration of a release, and the settlement is successfully impeached, the release has no operation in equity. *Kelsey v. Hobby*, 16 P. 269 . . . .xiv. 290.

2. A covenant, under seal, to come to a settlement within a limited time, and to pay the balance which might be found due, is merely collateral, and cannot be pleaded as an extinguishment of a simple contract debt, the period within which the settlement was to be made having elapsed before the commencement of the suit, and the plea not averring that any such settlement had been made. *Baits v. Peters*, 9 W. 556 . . . .vi. 182.

3. Acquittances given by some of the *cestuis que trust*, without full knowledge of the fraud which had been practised, do not bar them. *Michoud v. Girod*, 4 H. 508 . . . .xvi. 188.

4. Question, whether a release covered the matter in controversy in this suit. *Perkins v. Fourniquet*, 14 H. 813 . . . .xx. 195.

UNDUE INFLUENCE, 4.

## REMAINDER.

DEED, I.; WILL, D. 3.

## REMITTITUR.

PRACTICE, I. A. 5.

In an action of debt on a policy of assurance, the plaintiff may claim a verdict for the sum established to be due, by entering a *remittitur* of the residue of the sum demanded in the writ. *Hughes v. Union Ins. Co.* 8 W. 294 . . . .v. 420.

## REMOVAL OF CASES FROM STATE COURTS.

JURISDICTION, B. d.; STATE COURTS, B.

## RENT.

LEASES AND TERMS OF YEARS.

## REPLEVIN.

1. *Rien in arrear*, admits the demise laid in the avowry. *Alexander v. Harris*, 4 C. 299 . . . .ii. 111.

2. To an avowry by a sheriff, justifying the taking and detention by virtue of two writs of attachment, one against the plaintiff in replevin, and the other against a third person, a plea of payment to the plaintiff in the attachment, without an allegation of notice to the sheriff, or a discontinuance; also a plea of an accord between the plaintiff and defendant, in the attachment; also a plea of discontinuance subsequent to the action of replevin; also a plea that, when attached as the property of the plaintiff, the goods were in the possession of the sheriff under an attachment against a third person; also a plea that the goods were the property of the plaintiff and not of that third person, are all bad. *Livingston v. Smith*, 5 P. 90....ix. 239.

3. The receipt of a warehouseman for a quantity of wheat, given in consideration of a sum of money, no wheat being delivered, does not enable the promisee to maintain replevin against a third person, for wheat held by him in that warehouse, in which the plaintiff shows no property. *Jackson v. Hale*, 14 H. 525....xx. 315.

## REPORTER.

If an authenticated copy of the opinion of the court is desired, the reporter only can furnish it, certified; and the clerk of the court may certify, under the seal of the court, that he is the reporter, if this also is required. *Anonymous*, 8 P. 397....viii. 460.

COPYRIGHT, 2.

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## RETURN.

The marshal's return of the death of a party to an execution, does not make the fact of his death matter of record. *Walden's Lessee v. Craig's Heirs*, 14 P. 147 . . . . xiii. 894.

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**A. THE OFFICERS OF THE REVENUE.**

**1. POWERS AND DUTIES. (*Infra*, E. b. 2.)**

1. The act of February 18, 1793, § 27, (1 Stats. at Large, 315,) empowers any officer of the revenue to seize a vessel for any forfeiture. *Gelston v. Hoyt*, 3 W. 246....iv. 211.

2. Under the collection act of March 2, 1799, (1 Stats. at Large, 627,) every officer of the customs is empowered to make a seizure, in any district. *Taylor v. United States*, 3 H. 197....xv. 382.

3. A collector of the revenue of the United States has no authority to receive duties after his removal from office, though they became payable while he was in office. *Shreshley v. United States*, 4 C. 169....ii. 57.

**EMBARGO, C. 2, 3, 8, 9.**

**2. LIABILITIES, AND HEREIN OF CERTIFICATES OF PROBABLE CAUSE.**

1. A municipal seizure cannot be justified or excused upon the ground of probable cause, unless under the special provisions of some statute. *The Apollon*, 9 W. 362....vi. 88.

2. Under the collection act of March 2, 1799, (1 Stats. at Large, 678, § 71,)

"probable cause for the prosecution," imports circumstances which warrant suspicion. *Locke v. United States*, 7 C. 339 . . . .ii. 560.

3. The shipment of goods of foreign manufacture, from Boston to Baltimore, without certificates of the payment of duties, consigned to fictitious names, the marks of the packages having been changed, taken together, constitute probable cause for a prosecution, under the 50th section of the said act. *Ib.*

4. A count on that section is good, though it charge that the time, place, and vessel of importation were unknown to the attorney. *Ib.*

5. Instructions by the secretary of the treasury to a collector, not in accordance with the law, do not justify the illegal acts of the collector. *Tracy v. Swartwout*, 10 P. 80 . . . .xii. 26.

6. A decree of acquittal, on a proceeding *in rem*, without a certificate of probable cause of seizure, and not appealed from with effect, is conclusive, in every inquiry before any other court, that there was no justifiable cause of seizure. *The Apollon*, 9 W. 362 . . . .vi. 88.

7. And if the seizure be finally adjudged wrongful, and without probable cause, the party may proceed, at his election, by a suit at common law, or in the instance court of admiralty, for damages for the illegal act. *Slocum v. Mayberry*, 2 W. 1 . . . .iv. 1.

8. A doubt concerning the construction of a law may be good ground for seizure, and authorize a certificate of probable cause. *United States v. Riddle*, 5 C. 311 . . . .ii. 276.

9. In seizures under the embargo laws, the law itself is a sufficient justification to the seizing officer, where the discharge of duty is the real motive, and not the pretext for detention, and it is not necessary to show probable cause. *Otis v. Walter*, 2 W. 18 . . . .iv. 7.

#### EMBARGO, C. 4.

### 3. COMPENSATION, AND HEREIN OF THE DISTRIBUTION OF PENALTIES AND FORFEITURES.

1. The circuit court, having pronounced a decree of condemnation in a case of seizure, has jurisdiction of an application by a collector to award to him his share of the proceeds ; it is an incident to the possession of the principal cause. *M' Lane v. United States*, 6 P. 404 . . . .x. 174.

2. The collector's right to a distributive share of a forfeiture is inchoate, and may be released by the government, until the proceeds are actually received for distribution ; but whatever is reserved out of the forfeiture, is reserved as well for the seizing officer, as for the government. *Ib.*

3. This principle applied to the reservation of double duties, on the release of certain cargoes under a special act of congress. *Ib.*

4. The rights and interests of officers of the customs, in forfeitures, are subordinate to the authority of the secretary of the treasury to remit them, which has been conferred by congress, and may be exercised at any time before the money levied by the execution is paid to the collector of the customs. *United States v. Morris*, 10 W. 246 . . . .vi. 395.

5. The acts of congress providing for and limiting the compensation of col-

lectors of customs, examined, and their effect considered. These acts are: March 2, 1799, § 2, (1 Stats. at Large, 706;) April 30, 1802, § 3, (2 Stats. at Large, 172;) March 7, 1822, §§ 7, 9, (3 Stats. at Large, 694, 695;) July 7, 1838, § 3, (5 Stats. at Large, 264;) 5 Stats. at Large, 431, 432, §§ 2, 7, (6 Stats. at Large, 815,)—An act for the relief of Chastelain and Ponvert, July 21, 1840. *Hoyt v. United States*, 10 H. 109....xviii. 315.

6. The 89th and 91st sections of the collection act of 1799, (1 Stats. at Large, 695, 696,) do not make distributable the duties paid in case of seizure of property and its release on bond. *Ib.*

7. The collectors of customs are prevented by the act of March 3, 1839, § 3, (5 Stats. at Large, 349,) from obtaining any allowance for accepting and paying drafts by the secretary of the treasury, even if such service could be considered beyond the pale of their official duties. *Ib.*

8. A collector of the customs, who makes a seizure of goods for an asserted forfeiture, and before the proceedings *in rem* are consummated by a sentence of condemnation, is removed from office, acquires an inchoate right by the seizure, which, by the subsequent decree of condemnation, gives him an absolute vested right to his share of the forfeiture, under the collection act of the 2d of March, 1799, §§ 89, 91, (1 Stats. at Large, 695.) *Van Ness v. Buel*, 4 W. 74....iv. 347.

9. The 2d section of the act of May 10, 1800, (2 Stats. at Large, 72,) did not affect the commissions of collectors upon moneys received for duties on goods imported before that act, though such moneys were not received until after June 30, 1800. *United States v. Heth*, 3 C. 399....i. 617.

10. A bond was given to J. S., the collector of the district of Petersburg, under the 2d section of the embargo act of the 22d December, 1807, (2 Stats. at Large, 453,) and a suit was afterwards brought by him on the same bond in the district court, and pending the proceedings, to wit, on the 30th of October, 1811, the collector died; and judgment was recovered in favor of the United States, on the 30th of November, 1811. On the 26th of the same November, J. J. was appointed collector of the same district, and entered on the duties of his office on the 14th of December, 1811; until which time T. S., who was deputy collector under J. S. at his decease, continued as such to discharge the duties of the office. The judgment of the district court was subsequently affirmed by the circuit court. When the bond was taken, A. T. was surveyor of the district, and continued in that office until his death, which was after the commencement of the suit on the bond and before judgment thereon, and was succeeded by J. H. P., who was appointed on the 30th of March, 1811, and entered on the duties of his office on the 16th of the same month. It was held that the personal representatives of the deceased collector and surveyor, and not their successors in office, were entitled to that portion of the penalty which is, by law, to be distributed among the revenue officers of the district where it was incurred. There being no naval officer in the district, the division was adjudged to be made in equal proportions between the collector and surveyor. *Jones v. Shore's Executor. United States v. Jones*, 1 W. 462....iii. 633.

11. There is no act of congress which enables a collector of customs to act as an inspector, and claim compensation therefor. *Stewart v. United States*, 17 H. 116....xxi. 403.



12. Additional duties, by way of penalty, levied pursuant to the eighth section of the tariff act of 1846, (9 Stats. at Large, 43,) are not distributable to any officers of the customs. *Ring v. Maxwell*, 17 H. 147 . . . . xxi. 418.

13. Though the act of February 11, 1846, § 3, (9 Stats. at Large, 3,) applies, in terms, only to the additional duties levied under the seventeenth section of the tariff act of 1842, yet those levied under the eighth section of the tariff act of 1846, are only substitutes therefor in certain cases, and to be governed by the same rule as to distribution. *Ib.*

## B. WHAT ARE REVENUE LAWS, AND THEIR RULES OF CONSTRUCTION.

*Infra*, E. e.

1. The act of March 3, 1845, (5 Stats. at Large, 732,) is a revenue law, within the meaning of the act of May 31, 1844, (5 Stats. at Large, 658,) as to writs of error and appeals. *United States v. Bromley*, 12 H. 88 . . . . xix. 43.

2. Revenue laws, which impose forfeitures for fraud, are not technically penal, so as to call for a strict construction; they should be construed so as effectually to accomplish the intentions of their makers. *Taylor v. United States*, 3 H. 197 . . . . xv. 382.

3. The denomination of merchandise in a tariff act is to be understood in the sense in which the same terms are employed by merchants. *United States v. One Hundred and Twelve Casks of Sugar*, 8 P. 277 . . . . xi. 99.

4. Though generally, the name by which an article is known in commerce, is taken to include that article in a revenue law, yet, by a course of legislation, it may be made apparent that congress did not intend to include a particular article under a name, which, among commercial men, would include it. *De Forest v. Lawrence*, 13 H. 274 . . . . xix. 495.

5. This principle applied to dried sheepskins, having the wool on, under the act of July 30, 1846, (9 Stats. at Large, 42.) *Ib.*

6. Though among sugar-refiners, sugars, which have not undergone the process of claying, may be spoken of as refined sugar, yet, if this term, among buyers and sellers in this country generally, is applied only to lump and loaf sugar, the term in the acts of congress must be construed to include only those articles. *Barlow v. United States*, 7 P. 404 . . . . x. 522.

7. Revenue laws class substances according to their denominations acquired by general use in our own trade. *Two Hundred Chests of Tea*, 9 W. 430 . . . . vi. 121.

## C. TERRITORIAL APPLICATION OF THESE LAWS, AND HEREIN OF COLLECTION DISTRICTS.

1. The 29th section of the collection act of 1799, (1 Stats. at Large, 648,) does not extend to the case of a vessel arriving from a foreign port, and passing through the conterminous waters of a river, which forms the boundary between the United States and the territory of a foreign state, for the purpose of proceeding to such territory. *The Apollon*, 9 W. 362 . . . . vi. 88.

2. Duties collected in California between February 3, 1848, (the date of the treaty of peace,) and November 13, 1849, (when the collector entered on

the duties of his office,) were not illegally exacted, and cannot be recovered back by the importer. *Cross v. Harrison*, 16 H. 164....xxi. 66.

LAW OF NATIONS, E. 9-12.

#### D. ENTRY AND WAREHOUSING.

1. A consignment of a homeward cargo being "to order, the plaintiffs, who were indorsees of the bills of lading, had a right to enter the goods, under the 36th and 62d sections of the collection act, of March 2, 1799, (1 Stats. at Large, 627.) *Conard v. Pacific Ins. Co. of New York*, 6 P. 262....x. 110.

2. Under the warehousing act of August 6, 1846, (9 Stats. at Large, 33,) an importer had not a right, as soon as the law was passed, and independently of any regulations by the secretary of the treasury, to land his goods at the port of delivery to which they were destined, and store them there, on giving such bonds as that act required. *Tremlett v. Adams*, 13 H. 295....xix. 507.

3. The act was confined to ports of entry, until extended by the action of the secretary, to ports of delivery. *Ib.*

#### E. THE ASSESSMENT AND COLLECTION OF DUTIES.

##### a. WHEN THE RIGHT ACCRUES.

1. Duties upon goods imported, do not accrue until their arrival at the port of entry. *United States v. Vowell*, 5 C. 368....ii. 297.

2. The duty upon salt, which ceased with the 31st of December, 1807, was not chargeable upon a cargo which arrived within the collection district before that day, but did not arrive at the port of entry until the 1st of January, 1808. *Ib.*

3. The act of July 1, 1812, (2 Stats. at Large, 768,) took effect on the day of its passage, and the cargo of a vessel arriving on that day, is liable to the additional duties imposed by that act. *Arnold v. United States*, 9 C. 104....iii. 287.

4. To constitute an importation so as to attach the right to duties, an arrival within the limits of some port of entry is necessary. *Ib.*

5. If captured goods, claimed by a neutral owner, be by consent sold under an order of the court, and afterwards, by the final sentence of the court, the proceeds are ordered to be restored to such owner, the amount of the duties due to the United States upon the importation of the goods must be paid. *The Concord*, 9 C. 387....iii. 390.

6. The decision in the case of *The Concord*, (9 C. 387,) that property libelled as prize, sold by consent, and ordered to be restored to the claimant, is liable to the same duties as if voluntarily imported, affirmed. *The Nereide*, 1 W. 171....iii. 508.

7. Under the act of June 5, 1794, (1 Stats. at Large, 384,) duties did not accrue on refined sugar while it remained in the manufactory unsold, and consequently, when this act was repealed by the act of April 6, 1802, (2 Stats. at Large, 148,) the saving of duties which had accrued, did not apply to such sugars. *Pennington v. Cox*, 2 C. 83....i. 439.

## b. ASCERTAINING THEIR AMOUNT.

## 1. ALLOWANCES FOR LEAKAGE, &amp;c.

1. Under the tariff act of July 30, 1846, (9 Stats. at Large, 46,) duty is to be assessed, not upon the weight of sugar in the invoice, but the weight when landed; although no express direction is contained in any law to make an allowance for loss of weight of sugar by drainage; and although the aggregate value is thus reduced below the aggregate cost named in the invoice. *Marriott v. Brune*, 9 H. 619 . . . .xviii. 283.

2. The preceding decision, *Marriott v. Brune*, 9 H. 619, affirmed, and applied to a case in which there was evidence that the expected loss of weight of sugars, affected the cost in the place of exportation. *United States v. Southmayd*, 9 H. 637 . . . .xviii. 290.

3. Under the tariff act of July 30, 1846, (9 Stats. at Large, 42,) only the quantity of brandy imported, not that shown by the invoices, is dutiable; but as this act lays upon it an *ad valorem* duty, the allowance for leakage of two per centum of quantity gauged, cannot be made under the 59th section of the collection act of 1799, (1 Stats. at Large, 672,) because that law applied only to liquors subject to duty by the gallon. *Lawrence v. Caswell*, 13 H. 488 . . xix. 612.

2. DUTIABLE VALUES, AND HEREIN OF APPRAISEMENTS. (*Infra*, E. e.)

1. Appraisers have not authority to fix weights or quantities, only valuations. *Marriott v. Brune*, 9 H. 619 . . . .xviii. 283.

2. The 2d section of the tariff act of July 14, 1832, (4 Stats. at Large, 583,) is not the only one which may be applicable to an importation of wool, invoiced at less than seven cents per pound, and not mixed; under the 7th section the collector may order an appraisement, and, if that results in a valuation of over seven cents per pound, the *ad valorem* and specific duty provided for by the act of May 19, 1828, (4 Stats. at Large, 270,) must be levied, the appraisal being conclusive of the value. *Rankin v. Hoyt*, 4 H. 327 . . . .xvi. 128.

3. It is to be presumed that appraisers acted at the request of the collector, if he levied the duty in conformity with their act: and, if there was no such request, his adoption of their act would be equivalent to such request. *Ib.*

4. Under the 16th and 17th sections of the tariff act of August 30, 1842, (5 Stats. at Large, 563,) the value of merchandise at the time of its procurement is to be ascertained, not its value at the time of exportation. *Greely v. Thompson*, 10 H. 225 . . . .xviii. 377.

5. An appraisement under the same sections can be lawfully made only after a personal examination of the merchandise by the appraisers. *Ib.*

6. Neither the collector nor the secretary of the treasury can remove a merchant appraiser, duly appointed and qualified, unless for misconduct. *Ib.*

7. The decision in the next preceding case, *Greely v. Thompson*, 10 H. 225, applied to this case. *Maxwell v. Griswold*, 10 H. 242 . . . .xviii. 385.

8. Under the sixteenth and seventeenth sections of the tariff act of 1842, (5 Stats. at Large, 563-4,) the power of the government appraisers was not terminated by returning an appraisement to the collector; when they found it

was questioned, they had a right to reconsider it, and for this purpose to call on the importer to produce his correspondence, and he could not, by taking an appeal, exempt himself from the duty of producing it. *Bartlett v. Kane*, 16 H. 263 . . . xxi. 122.

9. The decision of the government appraisers is final, if not appealed from; or if an appeal, having been taken, is waived. *Ib.*

10. Under the tariff act of March 2, 1883, (4 Stats. at Large, 629,) the government was authorized to collect duties upon goods imported after June 30, 1842, and the regulations for ascertaining the amount of duties provided by existing laws, are to be applied, so far as they are applicable, to the collection of duties under this act, though the place in reference to which the value of goods was to be appraised, is changed from the foreign country to the port of importation, and no corresponding change is made in the instrumentalities for ascertaining the home value. *Aldridge v. Williams*, 3 H. 1 . . . xv. 268.

11. The words "true value," in the act of April 20, 1818, (3 Stats. at Large, 436, § 11,) mean the actual cost thereof to the importer, at the place whence the goods were imported. *United States v. Tappan*, 11 W. 419 . . . vi. 646.

12. And the collector had not the right to direct an appraisement, because he suspected, or because, in fact, the goods were invoiced below their current market value, at the place from whence they were exported. *Ib.*

13. But if the collector forms an opinion that there are just grounds to suspect the invoice does not truly state the actual cost of the goods, and directs an appraisement, no inquiry can be made as to the grounds of that opinion. *Ib.*

14. The twentieth section of the tariff act of 1842, (5 Stats. at Large, 565,) was not designed to levy duties, but to check fraudulent evasions, or prevent doubts in the execution of the revenue laws; and it is not repealed by the tariff act of 1846, (9 Stats. at Large, 42.) *Stuart v. Maxwell*, 16 H. 150 . . . xxi. 61.

#### c. DRAWBACKS.

Additional duties, by way of penalty, levied under the eighth section of the tariff act of 1846, (9 Stats. at Large, 43,) do not make a part of the drawback, to be returned on exportation. *Bartlett v. Kane*, 16 H. 263 . . . xxi. 122

#### d. REMEDIES TO RECOVER DUTIES.

##### ADMIRALTY, A. 2.

1. Under the 62d section of the collection act of March 2, 1799, (1 Stats. at Large, 673,) the United States have no lien for duties. *Harris v. Dennie*, 8 P. 292 . . . viii. 422.

2. But goods imported from a foreign country and not entered, are in the custody of the laws of the United States, and cannot be attached upon state process. *Ib.*

3. Under the 65th section of the collection act, of 1799, (1 Stats. at Large, 676,) the court is not forbidden to grant to the defendant such delay as may be necessary to obtain evidence, where there is a real defence. *United States v. Phelps*, 8 P. 700 . . . xi. 264.

4. Under the 65th section of the collection act of March 2, 1799, (1 Stats. at Large, 677,) though the party is interdicted from an imparlance, or any other means or contrivances for mere delay, he is not shut out from any defence upon the merits; he may plead a tender. *Ex parte Davenport*, 6 P. 661....x 302.

5. Under the collection act of March 2, 1799, (1 Stats. at Large, 627,) duties, due upon goods imported, constitute a personal debt or charge upon all the importers, and the collector has no power to extinguish this debt by taking a bond from one of several joint consignees. *Meredith v. United States*, 13 P. 486....xiii. 260.

#### SURETY, 1.

#### a. CONSTRUCTION OF PARTICULAR TERMS USED IN TARIFF ACTS TO DESIGNATE PARTICULAR IMPORTS, OR TO LEVY DUTIES ON PARTICULAR ARTICLES.

##### *Supra*, B.

1. Worsted being a distinct article, well known in commerce under that name, worsted shawls with cotton borders, and suspenders with cotton ends, were held not to be manufactures of wool, under the 2d section of the tariff act, of July 14, 1832, (4 Stats. at Large, 583.) *Elliott v. Swartwout*, 10 P. 137....xii. 46.

2. It is a settled rule to construe the denomination of articles, in tariff laws, according to the commercial understanding of the terms used. *Ib.*

3. A duty on "cotton bagging" can be levied only on articles known as such in commerce, when the act imposing the duty was passed. *Curtis v. Martin*, 3 H. 106....xv. 322.

4. Under the 5th section of the tariff act of August 30, 1842, (5 Stats. at Large, 555,) a duty of 30 per cent. *ad valorem* is imposed on India-rubber shoes, made by dipping a mould into the gum while in a liquid state. They are manufactured articles. *Lawrence v. Allen*, 7 H. 785....xvii. 407.

5. Under the tariff act of 1846, (9 Stats. at Large, 42,) shawls of worsted, worsted and cotton, silk and worsted, silk, barege, merino, mousseline de laine, and worsted and silk scarfs, are wearing apparel, and subject to a duty of thirty per centum *ad valorem* under schedule C. *Maillard v. Lawrence*, 16 H. 251....xxi. 115.

6. Under the tariff act of July 14, 1832, (4 Stats. at Large, 583,) and the amendatory act of March 2, 1833, (4 Stats. at Large, 629,) silk hose were free from duty. *Bend v. Hoyt*, 13 P. 263....xiii. 142. *Hardy v. Hoyt*, 13 P. 292....xiii. 158.

7. Under the tariff act of July 30, 1846, (9 Stats. at Large, 44, sched. B,) glass tumblers, having the entire surface or bottom smoothed, or polished, or their sides figured or ornamented by cutting, or grinding, are "glass cut," and subject to a duty of 40 per centum *ad valorem*. *Binns v. Lawrence*, 12 H. 9....xix. 7.

8. The act of congress of the 24th July, 1813, (3 Stats. at Large, 42,) imposing a duty on all stills employed in distilling spirits, does not extend to the rectification or purification of spirits already distilled. *United States v. Tenbroek*, 2 W. 248....iv. 96.

9. "Round copper bottoms turned up at the edge," are not liable to duties, although imported under the denomination of "raised bottoms." *United States v. Potts*, 5 C. 284....ii. 264.

## F. PENALTIES AND FORFEITURES.

See THAT TITLE; SHIPPING, A. 2.

### 1. WHEN INCURRED OR NOT.

1. The 68th section of the collection act of 1799, (1 Stats. at Large, 677,) reaches cases where, by a fraudulent undervaluation, less than the legal amount of duties has been paid, as well as where none have been paid. *Taylor v. United States*, 3 H. 197....xv. 382.

2. The 16th section of the act of February 18, 1793, (1 Stats. at Large, 311,) does not forfeit the goods for the neglect of the master to insert in the manifest the particular description of articles of foreign manufacture required by that section; and the 17th section does not apply to such imperfections in the manifest. If the master does deliver to the collector, on arrival, the manifest certified by the collector at the port of departure, and it actually contains the goods, though imperfectly described, no forfeiture is incurred. *United States v. Carr*, 8 H. 1....xvii. 476.

3. Under the 66th section of the collection act of 1799, (1 Stats. at Large, 677,) the forfeiture of the goods does not take effect until the United States have made an election to take the goods and not their value. *Caldwell v. United States*, 8 H. 366....xvii. 625.

4. Under the 84th section of the collection act of March 2, 1799, (1 Stats. at Large, 694,) a forfeiture may be incurred by entering for drawback, under a false denomination, sugars not previously imported and subjected to duty. *Barlow v. United States*, 7 P. 404....x. 522.

5. If entered by a false denomination, the burden of proof is upon the claimant to show that it was by mistake or accident, and a mistake of law is not sufficient. *Ib.*

6. Under the 66th section of the collection act of 1799, (1 Stats. at Large, 677,) the facts that the duties were paid, and the goods passed through the custom-house, do not prevent a forfeiture for a fraudulent invoice; and this section is not repealed by the act of May 28, 1830, (4 Stats. at Large, 410, § 4,) nor by the act of July 14, 1832, (4 Stats. at Large, 593, § 14.) *Wood v. United States*, 16 P. 342....xiv. 336.

7. Under the collection act of February 18, 1793, (1 Stats. at Large, 316, §§ 32, 33,) cargo not subject to duties, and not belonging to the owner, master, or mariners, was not forfeited, by reason of a licensed vessel being employed in a trade for which she was not licensed. *Sloop Active v. United States*, 7 C. 100....ii. 469.

8. Under the collection act of March 3, 1799, § 48, (1 Stats. at Large, 660,) goods landed from a derelict vessel, in order to save them, are not forfeited by being found without the custom-house marks. *Peisch v. Ware*; *United States v. Cargo of the Ship Favourite*, 4 C. 347....ii. 132.



9. The 51st section of the same act applies only to removals by the owner, or with his consent, or connivance. *Ib.*

10. Under the 52d section, the misconduct of mere strangers does not work a forfeiture. *Ib.*

11. The law punishes the attempt, not the intention, to defraud the revenue by false invoices. *United States v. Riddle*, 5 C. 311 . . . ii. 276.

12. The penalty of the 50th section of the collection law of 2d March, 1799. (1 Stats. at Large, 665,) which requires a permit for the landing of goods imported, applies to goods the importation of which was prohibited by law. *Harford v. United States*, 8 C. 109 . . . iii. 45.

13. Under the 68th section of the collection act of March 2, 1799, (1 Stats. at Large, 677,) teas, which have been regularly entered, landed, and stored, and the bond of the importer, without surety; given for the duties, pursuant to the 62d section, are not subject to forfeiture by being fraudulently withdrawn from the storehouse and concealed, because the duties have been "secured to be paid." *United States v. Three Hundred and Fifty Chests of Tea*, 12 W. 486 . . . vii. 302.

14. To cause a forfeiture under the 43d section, the chests must be unaccompanied not only by the proper certificates, but by the marks required by the 39th section. *Ib.*

15. Under the 19th section of the act of February 18, 1793, (1 Stats. at Large, 313,) goods are liable to forfeiture, though they did not belong to the master, owner, or any mariner of the vessel in which they were imported, and though the duties were paid on them at the port of entry. *Priestman v. United States*, 4 D. 28 . . . i. 321.

16. Although a mere intention to evade the payment of duties be not *per se* a cause of forfeiture, yet, when a question arises whether an act has been committed which draws after it that consequence, such intention will justify the court in not putting on the conduct of the party, in respect to the act in question, an interpretation as favorable as under other circumstances it would be disposed to do. *The Robert Edwards*, 6 W. 187 . . . v. 54.

17. The making a correct post entry does not bar a forfeiture for a prior fraudulent entry, under the 67th section of the act of March 2, 1799, (1 Stats. at Large, 677.) *United States v. Six Packages of Goods*, 6 W. 520 . . . v. 145.

18. Under the 43d section of the collection act, of March 2, 1799, (1 Stats. at Large, 660,) liquors are not forfeited because contained in casks in which other liquors were imported, if they are of American manufacture, or the duties had been paid on their importation. *Sixty Pipes of Brandy*, 10 W. 421 . . . vi. 461.

19. The French tonnage duty act of the 15th of May, 1820, (3 Stats. at Large, 605,) inflicts no forfeiture of the vessel for the non-payment of the tonnage duty. The duty is collectable in the same manner as by the collection act of 1799. *The Apollon*, 9 W. 862 . . . vi. 88.

20. The 66th section of the collection act of 1799, (1 Stats. at Large, 677,) is not repealed by the 19th section of the tariff act of 1842, (5 Stats. at Large, 565,) nor by the 8th section of the tariff act of 1846, (9 Stats. at Large, 43.) *United States v. Sixty-seven Packages of Dry Goods*, 17 H 85 . . . xxi. 383.



21. Repeals, by implication, of revenue and collection laws, not favored. *Ib.*
22. The decision in the next preceding case again affirmed. *United States v. Nine Cases of Silk Hats*, 17 H. 97 . . . . xxi. 390.
23. The decision in the two preceding cases affirmed. *United States v. One Package of Merchandise*, 17 H. 98 . . . . xxi. 390.
24. The decision in the three preceding cases affirmed. *United States v. One Case of Clocks*, 17 H. 99 . . . . xxi. 391.
25. The 4th section of the collection act of 1880, (4 Stats. at Large, 410,) the 14th section of the tariff act of 1832, (4 Stats. at Large, 593,) and the 66th section of the collection act of 1799, (1 Stats. at Large, 677,) explained. *Clifton v. United States*, 4 H. 242 . . . . xvi. 89.

## 2. SEIZURES AND PROCEEDINGS THEREON, AND HEREIN OF EVIDENCE.

### ADMIRALTY, C. a. 5; EVIDENCE, B.

1. What probable cause, shown by the prosecution, changes the burden of proof under the 71st section of the collection act of 1799, (1 Stats. at Large, 678.) *Wood v. United States*, 16 P. 342 . . . . xiv. 386.
2. What amounted to probable cause under that section. *Clifton v. United States*, 4 H. 242 . . . . xvi. 89.
3. The court, and not the jury, determines whether probable cause for the prosecution has been shown under that section, and in this particular, *Taylor v. The United States*, 3 How. 211, is affirmed. *Buckley v. United States*, 4 H. 251 . . . . xvi. 98.
4. Circumstances which may throw the *onus probandi* on the claimants. *Taylor v. United States*, 3 H. 197 . . . . xv. 382.
5. On trial of an information for a forfeiture of goods, on account of a fraudulent undervaluation, the United States may give in evidence the return of the appraisements, made by the official appraisers, and by the merchant appraisers on an appeal taken by the claimant, and may ask experienced persons what, in their judgment, the goods in question must have cost, and may introduce invoices of other importations made by the same claimant, and may show that the prices, at which his agent had sold other goods for him, exceeded the invoice prices more than one hundred and twenty per centum. *Buckley v. United States*, 4 H. 251 . . . . xvi. 98.
6. Though a superior physical force is not necessary to make a seizure, the party in possession must have submitted to the control of the seizing officer, otherwise the seizure is not made. *The Josefa Segunda*, 10 W. 312 . . . . vi. 414.
- 6a. If a seizure be voluntarily abandoned, it becomes a nullity; it must be followed up by appropriate proceedings to be effectual to confer rights to the property. *Ib.*
7. If a seizure, by a collector, for a violation of the revenue laws of the United States be voluntarily abandoned, and the property restored before the libel or information be filed and allowed, the district court has not jurisdiction of the cause. *The Ann*, 9 C. 289 . . . . iii. 356.
8. The regularity of the seizure is not in issue upon pleadings addressed to

the merits ; it requires a plea in abatement to put it in issue. *Taylor v. United States*, 3 H. 197 . . . . xv. 382.

9. If the government institute proceedings to enforce a forfeiture, it is wholly immaterial who made the seizure, or whether it was regular or not, or whether the cause assigned for seizing is the same for which a condemnation is sought. *Ib.*

10. 3 Wheat. 246, 16 P. 342, affirmed. *Ib.*

11. If a seizure was actually made and continued, the United States have a right to adopt it, and proceed for a good cause of forfeiture, though that cause was unknown to the original seizers. *Wood v. United States*, 16 P. 342 . . . . xiv. 336.

12. The seizing officer is a party to the suit *in rem*, under the government for whom he acted. *Gelston v. Hoyt*, 3 W. 246 . . . . iv. 211.

13. At common law, any person may, at his peril, seize for a forfeiture to the government. *Ib.*

14. Any citizen may seize any property forfeited to the use of the government, either by the municipal law, or as prize of war, in order to enforce the forfeiture ; and it depends upon the government whether it will act upon the seizure ; if it proceeds to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure. *The Caledonian*, 4 W. 100 . . . . iv. 356.

15. A non-commissioned cruiser may seize for the benefit of the government. *Carrington v. Merchants' Insurance Company*, 8 P. 495 . . . . xi. 192.

16. It is not a bar to an information for a forfeiture for a fraudulent undervaluation, that the goods had been regularly entered, appraised, and the duties paid. *Clifton v. United States*, 4 H. 242 . . . . xvi. 89.

EVIDENCE, J. 2 ; INSURANCE, F. 20 ; JURY, A. 13.

## G. REMEDIES OF OWNERS OF PROPERTY SEIZED OR DETAINED

1. The effect of the 2d section of the act of March 3, 1839, (5 Stats. at Large, 348,) is, that an action cannot be maintained against a collector of customs to recover back money illegally exacted by him as, and for, duties, although paid under protest. *Cary v. Curtis*, 3 H. 236 . . . . xv. 409.

2. Where the plaintiff, through a clerk, entered goods at the custom-house as cotton goods, and made the usual oath that the entry contained a just and true account of the goods, and upon the faith thereof they were delivered to him by the collector without examination, and nine months after the duties were paid, the plaintiff gave notice to the collector that the goods were silk hose, not subject to duty—*Held*, that the mistake of fact, if any, having arisen from the culpable negligence of the plaintiff, whereby the government was no longer in a condition to ascertain by examination the character of the goods, the money could not be recovered back. *Bend v. Hoyt*, 13 P. 263 . . . . xiii. 142.

3. An action of trespass will lie for the seizure, only after the property has been restored by a decree of the proper court of the United States, and a certificate of probable cause refused. *Gelston v. Hoyt*, 3 W. 246 . . . . iv. 211.

4. And such a decree is conclusive evidence against a forfeiture. *Ib.*

5. The importer has such a right of possession as a general owner, that,

after he has duly offered to enter the goods and pay the duties, he may maintain an action of trespass for a wrongful taking thereof. *Conard v. Pacific Ins. Co. of New York*, 6 P. 262....x. 110.

6. If an importer, on being refused permission to enter his goods at their value as of the time of procurement, and to avoid the penal duty provided for by the 8th section of the tariff act of July 30, 1846, (9 Stats. at Large, 43,) thereupon adds to the valuation in his invoice, under protest, and pays the duty assessed thereon, he may maintain an action to recover back the difference between the duty leviable by law on the original, and the increased valuation. *Maxwell v. Griswold*, 10 H. 242....xviii. 385.

7. A protest, made before duties are finally adjusted and closed, is in season, under the act of February 26, 1845, (5 Stats. at Large, 727,) although moneys had been previously advanced on account of the duties. *Marriott v. Brune*, 9 H. 619....xviii. 288.

## REVIEW.

BILLS OF REVIEW.

## REVIVOR.

EQUITY, B. c.; PRACTICE, I. A. 3, II. B.

## REVOLT.

CONSTITUTIONAL LAW, A. 14, 15.

## RIVER.

PUBLIC LANDS OF UNITED STATES, II. 1.

1. The Ohio River being a public navigable stream, of right should remain free and unobstructed. *Pennsylvania v. Wheeling and Belmont Bridge Company*, 13 H. 518....xix. 621.

2. By the laws of Pennsylvania, the Delaware is a public navigable river, held by Pennsylvania and New Jersey in trust for the public use; riparian owners have no title to the river, or any right to obstruct or divert its waters, except by license from the State; and it was held in this case that the license of the plaintiffs was subject to the power of the State to divert the water for public improvements. *Rundle v. Delaware and Raritan Canal Company*, 14 H. 80....xx. 48.

3. The words "the source of the most southern branch of the Oconee River, including all the waters of the same," refer to the source of the main stream,

and not to the source of an inconsiderable rivulet. *Patterson v. Jenks*, 2 P. 216....viii. 92.

PUBLIC LANDS OF STATES, A. 68.

## RULES OF COURT.

COURTS OF THE UNITED STATES, B. b. e.

## SALES.

CONTRACT, C. I.; DAMAGES; FRAUD, B.; VENDOR AND PURCHASER.

- A. WHAT IS, AND WHEN PROPERTY PASSES, 468.
- B. WARRANTY, AND CONSEQUENCES OF BREACH, 470.
- C. STATUTE OF FRAUDS, 470.
- D. STOPPAGE IN TRANSITU, 470.
- E. JUDICIAL SALES, 471.

### A. WHAT IS, AND WHEN PROPERTY PASSES.

ADMIRALTY, A. 1.

1. If a commission merchant, in the usual course of business, makes advances to the owner of merchandise, stored in a distant city, and receive from such owner, as security, the warehouse certificate for the property, and an order thereon to deliver the property to himself, the legal title passes to the commission merchant as security for his advances, and the goods cannot be attached and taken possession of as the property of the former owner, who has only an equitable interest therein, though neither the warehouseman nor the attaching creditor has notice of such transfer. *Gibson v. Stevens*, 8 H. 384....xvii. 631.

2. If a consignor take from the carrier an obligation to deliver the goods "to A for the use of B," the purpose being to secure a debt due from the consignor to B, the assent of the latter will be presumed, and the property passes at once to B, and cannot be attached for a debt of the consignor. *Grove v. Brien*, 8 H. 429....xvii. 648.

3. If the consignor is the sole owner of the goods, he may pass the title to them by a bill of sale, good as against all persons save a *bond fide* indorsee of the bill of lading; and if such assignment be made of an outward cargo, the title attaches to its proceeds sent home. *Conard v. Atlantic Ins. Co. of New York*, 1 P. 386....vii. 637.

4. An article, purchased in general terms from among many of the same

description, if afterwards selected and set apart with the assent of the parties as the thing purchased, is as completely sold as if it had been selected and designated at the time the contract was made. *Thompson v. Gray*, 1 W. 75 . . . . iii. 471.

5. A contract of sale, approved security for the purchase-money to be given on delivery, and in the mean time the article to remain in possession of the vendors, passes the property, unless there is some stipulation which controls its legal effect. *Ib.*

6. An agent abroad, who purchases in pursuance of orders, may vest the property immediately in his principal, by purchasing on his exclusive credit, or making an absolute appropriation of the property to him. *The St. Joze Indiano*, 1 W. 208 . . . . iii. 523.

7. But if he intends to execute the order by his own goods, or goods purchased on his own credit, and thus made his own, and consigns them to his own house, to be delivered to the principal when certain conditions are complied with, the property is not divested from the agent, and is at his risk. *Ib.*

8. Goods, shipped by a British to an American house, (partly in conformity with orders, and partly without orders,) who had an option to accept or reject the whole invoice in a limited time, remain the property of the shippers until the election be made to accept them. *The Frances*, 8 C. 354 . . . . iii. 172.

9. If the shipper of goods send with them an offer, in writing, to the consignee, to become jointly interested in the consignment, until the offer is accepted, the consignor is the sole owner. *The Venus*, 8 C. 253 . . . . iii. 116.

10. Where goods were shipped in the enemy's country, in pursuance of orders from this country received before the declaration of war, but previous to the execution of the orders, the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to them, (the bankers,) and they also repeated the same request, the invoice being for account and risk of the consignees, but stating the goods to be then the property of the bankers; it was held, that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not divested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees, and the lien of the shippers on the goods. *The Mary and Susan*, 1 W. 25 . . . . iii. 452.

11. Under article 1905 of the code of Louisiana, if a written memorandum of a sale be made, and an order by the vendee to the vendor to deliver the article sold to a third person, be indorsed on such memorandum, and presented to the vendor, this is a demand in writing, and satisfies the requirement of that article. *Barrow v. Reab*, 9 H. 366 . . . . xviii. 178.

12. A tortious possessor under an illegal capture cannot make a valid title by a sale. *The Fanny*, 9 W. 658 . . . . vi. 224.

13. But a purchaser in good faith under such a sale, is entitled to be reimbursed for freight paid on the goods, and an innocent carrier of them also has a right to freight. *Ib.*

CAPTURE, F. 18-16, 18, 19.

## B. WARRANTY, AND CONSEQUENCES OF BREACH.

1. Breach of warranty, without an offer to return the property and rescind the contract, is not a defence to an action on a note given for the price of a chattel. *Thornton v. Wynn*, 12 W. 183 . . . .vii. 108.

2. A breach of warranty of title to personalty, without an eviction, is not a defence to an action for the price. *Randon v. Toby*, 11 H. 498 . . . .xviii. 694.

3. Upon a sale by the marshal, under an order of court, no warranty is implied. *The Monte Allegre*, 9 W. 616 . . . .vi. 213.

4. Neither the marshal, nor his agent, the auctioneer, has, as such, any authority to warrant the article sold. *Ib.*

5. Upon an admiralty proceeding, *in rem*, where the proceeds of the sale are brought into court, they are not liable to make good a loss sustained by the purchaser, merely in consequence of a defect in the article sold. *Ib.*

## C. STATUTE OF FRAUDS.

1. E. B. C., having an interest in a cargo at sea, agreed with J. W. for the sale of it; and J. W. signed the following agreement in writing: "J. W. agrees to purchase the share of E. B. C., in the cargo of the ship *Aristides*, W. P. Z., supercargo, say at \$2,522.83, at fifteen per cent. advance on said amount, payable at five months from this date, and to give a note or notes for the same, with an approved indorser." In compliance with this agreement, J. W. gave his notes for the sum mentioned, and in an action upon the notes, the want of a legal consideration, under the statute of frauds, being set up as a defence, on the ground of the defect of mutuality in the written contract; the court below left it to the jury to infer from the evidence an actual performance of the agreement, the jury found a verdict for the plaintiff, and the court below rendered judgment thereon. The judgment was affirmed by this court. *Weightman v. Caldwell*, 4 W. 85 . . . .iv. 352.

2. The following memorandum of a contract of sale of merchandise, accompanied by extraneous evidence explanatory of its terms, was held sufficient under the statute of frauds: "September 19, W. W. Goddard, 12 mos. 300 bales S. F. drills, 7½; 100 cases blues do. 8½. Credit to commence when ship sails; not after December 1,—delivered free of charge for truckage. The blues, if color satisfactory to purchaser.

(Signed,)

R. M. M.

W. W. G."

*Salmon Falls Manufacturing Company v. Goddard*, 14 H. 446 . . . .xx. 276.

## D. STOPPAGE IN TRANSITU.

Where goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent for the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent the consignee's lien from attaching. *The Frances*, 8 C. 418 . . . .iii. 200.

## E. JUDICIAL SALES.

1. A trustee, appointed by the chancellor of Maryland to sell one parcel of land, sold that, and subsequently sold another parcel, which was not embraced in the decree, and reported the latter sale to the court, and it was confirmed. *Held*, that there was no authority to make the sale, and that the order of confirmation did not render it valid. *Shriver's Lessee v. Lynn*, 2 H. 43....xv. 25.

2 In Louisiana, a creditor cannot treat a judicial sale as void, and levy his execution on the property as still belonging to the vendor, though the sale was made in fraud of his rights ; he must institute some proper direct judicial proceedings to set aside the sale. *Ford v. Douglas*, 5 H. 143....xvi. 341.

3. Where a creditor levied his execution on property which had belonged to his debtor, after a judicial sale, and, in his answer to a bill for an injunction, set up that the sale was fraudulent, it was held that this answer was insufficient in Louisiana ; but that he should have leave to file a cross-bill, impeaching the sale. *Ib.*

4. A decree of sale, in a suit to foreclose a mortgage, in which known *cestuis que trust* are not joined, the only defendant being the trustee who made the mortgage on account of the known *cestuis que trust*, does not bind the title of the latter. *Oliver v. Piatt*, 3 H. 333....xv. 479.

5. By the law of Louisiana, which, having been adopted by a rule of court, governed the sale in this case, made by the marshal, if movable property was sold without an appraisement, at the first bidding, the sale was void. *Collier v. Stanbrough*, 6 H. 14....xvi. 585.

## SALVAGE.

A. PARTIES ENTITLED TO BE SALVORS AND TO PARTICIPATE IN THE COMPENSATION, 471.

B. WHAT IS A SALVAGE SERVICE, 472.

C. SALVAGE ON RECAPTURE, 472.

D AMOUNT OF COMPENSATION, AND ITS FORFEITURE, 472.

E. OTHER MATTERS, 473.

A. PARTIES ENTITLED TO BE SALVORS AND TO PARTICIPATE IN THE COMPENSATION.

1. A pilot, while acting in the line of his strict duty, cannot entitle himself to salvage. *Hobart v. Drogan*, 10 P. 108....xii. 34.

2. But if he performs salvage services, after his relation to the vessel has ended, he is not disabled from claiming salvage by his occupation, nor by the fact that he had acted as pilot of the salved ship. *Ib.*



3. The share of an apprentice belongs to him and not to his master. *Mason v. Ship Blaireau*, 2 C. 440....i. 479.

4. A mariner of the vessel saved, left on board when she was deserted by her officers and crew, and who aided in the salvage service, is entitled to a share of the compensation. *Ib.*

5. An agreement of consortship, made by the masters of two vessels employed in the business of salvage, must be deemed to be made by the masters in behalf of the owners and crew, as well as themselves, and in the absence of a stipulation to that effect, is not dissolved by a change of one of the masters. *Andrews v. Wall*, 3 H. 568....xv. 555.

6. The answer to a libel is not evidence of a stipulation to that effect. *Ib.*

7. The admiralty has jurisdiction over such a contract of consortship, as a maritime contract. *Ib.*

#### B. WHAT IS A SALVAGE SERVICE. (JURISDICTION, C. 2.)

A donation on the high seas, by a captor to a neutral, does not exempt the property from recapture, and the donee, who brings it into a port of his own country, must be treated as a salvor. *The Adventure*, 8 C. 221....iii. 100.

#### C. SALVAGE ON RECAPTURE. (JUDGMENTS, &c. B. 2.)

1. The salvage act of March 3, 1801, (2 Stats. at Large, 16,) allows, as salvage, one sixth part of the value of cargo, both of armed and unarmed vessels recaptured. *Schooner Adeline and Cargo*, 9 C. 244....iii. 350.

2. In recaptures of property of friends, the rule of reciprocity is followed, and as France awards to recaptors the entire property of friends, recaptured after twenty-four hours' possession by the enemy, that rule must be applied to French property. *Ib.*

3. The right to salvage on recapture is recognized and regulated, not created, by acts of congress. *Talbot v. Seeman*, 1 C. 1....i. 331.

4. Neutral property is generally to be restored without salvage, but if the recapture is lawful, and a meritorious service is rendered, by relieving it from real and imminent danger of condemnation, salvage is due. *Ib.*

5. Its amount, not being regulated by any positive law, must be reasonable in reference to the peril from which the property was relieved, and the danger incurred in relieving it. One sixth of the net value awarded. *Ib.*

6. Under the 7th section of the act of March 2, 1799, (1 Stats. at Large, 716,) France was to be deemed an enemy of the United States in March, 1799, and a French privateer having captured an American vessel, a public armed vessel of the United States was entitled to salvage on recapture. *Bas v. Tingy* 4 D. 37....i. 322.

#### D. AMOUNT OF COMPENSATION AND ITS FORFEITURE.

1. In a case of civil salvage, where the amount of salvage is discretionary,

appeals should not be encouraged upon the ground of minute distinctions of merit; nor will the court reverse the decision of an inferior court, unless it manifestly appears that some important error has been committed. *The Sibyl*, 4 W. 98....iv. 355.

2. It is against sound policy and public convenience to encourage appeals in such matters of discretion, as the amount allowed for salvage. *Hobart v. Drogan*, 10 P. 108....xii. 34.

3. Fifty per centum of the gross value of goods saved from a derelict vessel in Delaware Bay, allowed for salvage. *Peisch v. Ware*. *United States v. Cargo of Ship Favourite*, 4 C. 347....ii. 132.

4. Salvage. Two fifths allowed; one third of the salvage compensation awarded to the owners of the saving vessel and cargo. *Mason v. Ship Blaireau*, 2 C. 240....i. 479.

5. Forfeiture of the share of the master of the saving vessel decreed on account of embezzlement. *Ib.*

6. If salvors collude with the master to defraud the owners, by means of an arbitration, they forfeit all their rights, and a court of admiralty has jurisdiction to reach and restore the property awarded. *Houseman v. Cargo of the Schooner North Carolina*, 15 P. 40....xiv. 15.

7. Spoliation, smuggling, and even gross neglect, may cause a forfeiture of the right to salvage compensation. *The Bello Corrunes*, 6 W. 152....v. 44.

#### E. OTHER MATTERS.

The demand of the ship-owners, for freight and general average, in a case where property is libelled for salvage, is to be pursued against that portion of the proceeds of the cargo which is adjudged to the owners of the goods, by a direct libel or petition; and not by a claim interposed in a salvage cause. *The Sibyl*, 4 W. 98....iv. 355.

#### SEA.

##### FISHERIES; HIGH SEAS; NAVIGABLE WATERS; STATES, C. 1, 2.

1. The title of the city of Boston to a part of the shore of the sea, within its limits, examined. *City of Boston v. Lecraw*, 17 H. 426....xxi. 590.

2. Though the proprietor of the shore, in Massachusetts, may build thereon, and thus exclude the public from its use for navigation when covered by the tide, until he does so the public may lawfully so use it, such use is not adverse, and lays no foundation for a presumption of a dedication of the land to that use. *Ib.*

3. *Martin v. Waddell*, 16 Pet. 367, affirmed and applied to a case where a part of the shore of New Jersey had been filled up and reclaimed, under a grant from the legislature of that State. *Den v. Jersey Company*, 15 H. 426 xx. 587.

## SEAL.

## DEED, A.

## SECRETARY OF THE TREASURY.

CONSTITUTIONAL LAW, C. 3, D. 1 ; PENALTIES, &c. C. 1, 2 ; PERJURY, 1.

## SEISIN AND DISSEISIN.

- A. WHAT IT IS, AND HOW WORKED OR GAINED, 474.
- B. EXTENT OF, 475.
- C. ELECTION AS TO, 475.
- D. EFFECT OF, 476.

## A. WHAT IT IS, AND HOW WORKED OR GAINED.

1. An entry under a deed from a tax collector, and possession of the land described in the deed, is sufficient evidence of an adverse seisin under a statute of limitations. *Pillow v. Roberts*, 13 H. 472....xix. 597.

2. One tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied with any act amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession. *M'Clung v. Ross*, 5 W. 116....iv. 582.

3. If land has been occupied and cultivated in such manner as the owners of such land are accustomed to occupy and cultivate it, the possession is adverse, and the statute of limitations runs. *Reed v. Proprietors of Locks and Canals*, 8 H. 274....xvii. 585.

4. If a widow, by mistake, receives to her sole use, rents which belong jointly to herself and her children, this does not oust the children. *Ib.*

5. When the holder of an inchoate title to land being in possession conveys the land by deed, and afterwards obtains a perfect title, his seisin comes at once to his grantee. *Barr v. Gratz's Heirs*, 4 W. 213....iv. 376.

6. If a purchaser of part of a tract, not severed, enters under his equitable title upon the whole tract, the possession, being under the legal title, its holder is entitled to the benefit of it, and has an actual seisin. *Ib.*

7. An inclosure is not indispensable to constitute possession; it is one of the acts from which an intention to assert ownership and exercise possession may be inferred. *Ellicott v. Pearl*, 10 P. 412....xii. 179.

8. A fence, building, or other improvement, is not essential to constitute an adverse possession; acts of ownership, under a claim of right visible and noto-

rious, are sufficient to authorize the jury to find such possession; and the nature of these acts of ownership much depend on the uses of which the land was capable. *Ewing v. Burnet*, 11 P. 41....xii. 328.

9. A valuable sand bank being exclusively and notoriously used by the defendant, who sold the sand and used it, this being the use to which the true owner of the land would naturally apply it, meets all the requisites of a legal adverse possession. *Ib.*

10. The uninterrupted payment of taxes on the land, for more than twenty-four successive years, is powerful evidence of a claim of right to it. *Ib.*

### B. EXTENT OF.

1. An actual entry upon part, under title, gives a constructive seisin of the whole tract to which the title extends. *Barr v. Gratz's Heirs*, 4 W. 213....iv. 376.

2. But not if any part was in the actual possession of one having better title. *Ib.*

3. In such case, the seisin of him having the better title extends to all not actually occupied by the other. *Ib.*

4. An entry without title works a disseisin of only so much as is actually occupied. *Ib.*

5. If the entry was without color of title, his seisin is bounded by his actual occupancy; if under a deed, or title, his seisin extends as far as his deed, or title, if the true owner was not in the actual possession of any part of the land; if he was, his constructive possession covers all of which the disseisor had not actual possession. *Clarke's Lessee v. Courtney*, 5 P. 319....ix. 366.

6. An entry under a deed gives possession of all vacant land described in the deed. *Ellicott v. Pearl*, 10 P. 412....xii. 179.

7. A possession under a junior patent, which interferes with a senior patent, the lands being wholly unoccupied by any one claiming under the latter, extends by construction to the whole tract. • *Sicard's Lessee v. Davis; Same v. Cecil*, 6 P. 124....x. 59.

8. If one enter having title, his seisin extends as far as his title, and is not limited to the part actually occupied by him. It extends to what is in the adverse seisin of the tenant on whom he enters, and to all vacant land within his title, but not to land of which other tenants are seized. *Green v. Lister*, 8 C. 229....iii. 104.

9. If the true owner be in possession of a part of the land granted to him, he has constructive possession of the residue, except so far as the actual possession of a wrongdoer extends. *Hunt v. Wickliffe*, 2 P. 201....viii. 85.

### C. ELECTION AS TO.

1. Though a mere trespasser cannot qualify his own wrong, and the owner may elect to consider himself disseised, yet if a wrongdoer asserts that he ousted the owner, he must prove it, and show something more than a mere trespass. *Clarke's Lessee v. Courtney*, 5 P. 319....ix. 366.

2. An entry is an ouster, or not, according to the intent with which the act is done, when the wrongdoer claims the benefit of it; if made under claim or color of right, it is an ouster, otherwise it is a trespass only. *Ewing v. Burnet*, 11 P. 41....xii. 828.

#### D. EFFECT OF.

##### LIMITATIONS, A.

1. Under the act of assembly of Kentucky, of 1798, entitled, "An act concerning champerty and maintenance," a deed will pass the title to lands, notwithstanding an adverse possession. *Walden v. Gratz's Heirs*, 1 W. 292....iii. 556.

2. Though a purchaser derives title from the vendor, his entry and possession, being for himself, ousts the vendor. *Society for the Propagation of the Gospel, &c. v. Town of Pawlet*, 4 P. 480....ix. 160.

3. An heir may enter and claim by title other than that of his ancestor, and thus by adverse possession acquire a title valid as against co-heirs and creditors. *Ricard v. Williams*, 7 W. 59....v. 221.

4. One who takes a deed of land from a third person, places it upon record, takes the profits of the land, and sells parts of it, has a sufficient adverse seisin to set up the statute of limitation, as against his children, whose guardian he was, and who claimed in right of their mother, once the lawful owner of the land. *Mercer's Lessee v. Selden*, 1 H. 87....xiv. 491.

#### SEIZURES.

ADMIRALTY, A. 2; EMBARGO, B. C.; EVIDENCE, B. 1; REVENUE LAWS, A. 1, 2; F. 2; STATE COURTS, A. 2.

#### SET-OFF.

BANKRUPT LAWS, C. 1; INSURANCE, J.; PRIORITY OF PAYMENT OF THE UNITED STATES, A.; RECEIVERS OF PUBLIC MONEY, C. 2.

A. BETWEEN WHAT PARTIES, 476.

B. IN WHAT ACTIONS, AND THE EFFECT THEREOF, 477.

C. WHAT MAY BE SET-OFF, 477.

D. WHEN EQUITY WILL GRANT THIS RELIEF, 477.

##### A. BETWEEN WHAT PARTIES.

1. In an action in Virginia by the assignee of a negotiable promissory note against the maker, the latter may set off a negotiable note of the assignor which he held at the time of receiving notice of the assignment of his own note, although the note thus set off was not due at the time of the notice, but became

due before the note upon which the suit was brought. *Stewart v. Anderson*, 6 C. 203 . . . .ii. 371.

2. If the United States bring an action for money had and received against one who has a legal claim for services rendered, he may set off this claim. *United States v. Ringgold*, 8 P. 150 . . . .xi. 53.

3. By making a note payable at a bank, the maker waives his right to offset a claim against the payee, in an action by the bank. *Mandeville v. Union Bank of Georgetown*, 9 C. 9 . . . .iii. 238.

## B. IN WHAT ACTIONS, AND THE EFFECT THEREOF.

In Pennsylvania, if a verdict is rendered for the defendant, and a sum found due to him by reason of his set-off, the judgment is not *quod recuperet*, but that he go without day; the finding by the jury of the sum due, is only the foundation for a *scire facias*; and where the United States is plaintiff, no *scire facias* can issue, and no judgment can be rendered for the balance. *Reeside v. Walker*, 11 H. 272 . . . .xviii. 623.

*Supra*, A. 2.

## C. WHAT MAY BE SET-OFF.

If three joint owners of a cargo employ the master of the ship to sell it for them, and he afterwards become interested in the share of one of the joint owners, he cannot, in an action brought against him by the three joint owners to recover the amount of sales, set off his share of that amount. *Young v. Black*, 7 C. 565 . . . .ii. 669.

## D. WHEN EQUITY WILL GRANT THIS RELIEF.

1. Where an agent effected two policies of insurance, and gave his own note for the premium, in an action on one policy, the underwriters may set-off the amount of the premium on the other policy, and having been prevented by an injunction from doing so, equity will compel the principal to allow the amount to be deducted from the judgment. *Leeds v. Marine Ins. Co.* 6 W. 565 . . . .v. 165.

2. A court of equity will not interfere to enforce a set-off, if the complainant could have made it in an action at law, and voluntarily waived it there. *Hendrickson v. Hinckley*, 17 H. 443 . . . .xxi. 601.

EQUITY, A. 16-18.

## SHIPPING.

BAILMENT, B.; BOTTOMRY AND RESPONDENTIA; INSURANCE; SALES, D.

A. REGISTRATION AND ENROLMENT, 478.

B OWNERSHIP AND NATIONAL CHARACTER, AND THE EVIDENCE THEREOF, 479

C. PART-OWNERS, 480.

D. BILLS OF LADING AND CHARTER-PARTIES, AND THE RIGHTS AND LIABILITIES ARISING THEREFROM, 480.

E. MASTER, 481.

F. MARINERS, 482.

G. BARRATRY, 482.

H. FREIGHT, 482.

I. REPAIRS AND SUPPLIES, 483.

#### A. REGISTRATION AND ENROLMENT.

1. The provisions of the 27th section of the registry act of 1792, (1 Stats. at Large, 298,) apply as well to vessels which have not been previously registered, as to those to which registers have been previously granted. *The Neptune*, 8 W. 601....iv. 309.

2. Libel under this section for the fraudulent use by a vessel of a certificate of registry, to the benefit of which she was not entitled. Vessel forfeited. *Ib.*

3. Under the act of December 31, 1792, § 4, (1 Stats. at Large, 289,) the absolute property in a vessel does not vest in the United States on the taking of the false oath. Some act must be done manifesting the intention of the government to take the vessel and not its value. *United States v. Grundy*, 3 C. 338....i. 599.

4. If the government elects to take the value, it can be recovered only in an action against the person who committed the offence, and the facts must be specially declared on. *Ib.*

5. Under the 27th section of the registry act, of December 31, 1792, (1 Stats. at Large, 298,) circumstances of suspicion sufficient, in the judgment of the court, to call for explanation being shown, and the claimant having it in his power, by the production of documents, to make a clear case either for the government or himself, and refusing to produce those documents, the vessel was condemned. *The Luminary*, 8 W. 407....v. 461.

6. A transfer of a registered vessel of the United States to a foreign subject, in a foreign port, for the purpose of evading the revenue laws of the foreign country, with an understanding that it is to be afterwards reconveyed to the former owner, works a forfeiture of the vessel, under the 16th section of the ship-registry act, of the 31st of December, 1792, (1 Stats. at Large, 295,) unless the transfer is made known in the manner prescribed by the 7th section of the act. *The Margaret*, 9 W. 421....vi. 116.

7. The proviso in the 16th section of the ship-registry act, being by way of exception from the enacting clause, need not be taken notice of in a libel brought to enforce the forfeiture. *Ib.*

8. It is matter of defence to be set up by the party in his claim. *Ib.*



9. The proviso applies only to the case of a part-owner, and not to a sole owner of the ship. *Ib.*

10. The trial, in such a case, is to be by the court, and not by a jury, in seizures on waters navigable from the sea by vessels of ten tons burden and upwards. *Ib.*

11. A registered vessel which continues to use its register, after a transfer under the above circumstances, is liable to forfeiture under the 27th section of the act, as using a register without being actually entitled to the benefit thereof. *Ib.*

12. Under the act of December 31, 1792, § 4, (1 Stats. at Large, 289,) if the oath describe one of the owners as "of the city of New York," when he is domiciled in England, the vessel is forfeited. *The Venus*, 8 C. 253....iii. 116.

## B. OWNERSHIP AND NATIONAL CHARACTER.

### TREATIES, A. 3.

1. If part of a vessel be sold by parol while at sea, and resold to the vendor on her arrival in port and before entry, she does not lose her American character, and no new register is necessary. *United States v. Willings*, 4 C. 48....ii. 14.

2. If a vessel be sold at sea to an American citizen, she is not forfeited thereby. On her arrival in port she is an American vessel, and a new register cannot and need not be taken till the old one is surrendered. *Ib.*

3. A vessel of the United States, captured, condemned, sold, purchased by her former master, a citizen of the United States, who obtained a Danish burgher's brief, and who cleared out of a port of the United States as a Dane, is a foreign vessel within the 5th section of the act of 9th January, 1808, (2 Stats. at Large, 454,) although she was really owned by a citizen of the United States. *The Good Catharine v. United States*, 7 C. 349....ii. 564.

4. Ship's papers, and documents accompanying property under the laws of nations, are but *prima facie* evidence of property, and are of no force when shown to be fraudulent. *United States v. The Amistad*, 15 P. 518....xiv. 156.

5. The enrolment of a bill of sale of a vessel is not necessary to pass the title. *Hozey v. Buchanan*. 16 P. 215....xiv. 258.

6. A question of fact as to ownership of a vessel. *United States v. The Burdett*, 9 P. 682....xi. 524.

7. A charter-party which lets the whole tonnage of a vessel for a voyage, and contains covenants by the owner that the outward and homeward cargo shall be delivered, dangers of the seas excepted, and that he will keep the vessel apparelled and manned during the voyage, does not make the hirer owner *pro hac vice*. *Hoe v. Groverman*, 1 C. 214....i. 397.

8. Where the general owner of a ship retains the possession, command, and navigation of the same, and contracts to carry a cargo on freight for the voyage, the charter-party is to be considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. *Marcadier v. Chesapeake Ins. Co.* 8 C. 39....iii. 15.

9. In such a case, the general owner is also owner for the voyage. *Ib.*

10. Consequently, if he be the master of the vessel, he is incapable of committing barratry. *Ib.*

11. The commission of a public vessel, signed by the proper authorities of the nation to which it belongs, is complete proof of national character; it imports absolute verity; and the title to the vessel, or mode in which it was acquired, is not examinable by a foreign court. *The Santissima Trinidad and The St. Ander*, 7 W. 288....v. 268.

CONFLICT OF LAWS, H. 1; EVIDENCE, K. 9-11; LAW OF NATIONS, E. 6, 7; PIRACY, 9.

### C. PART-OWNERS. (ADMIRALTY, A. 2.)

1. A sale is never directed, upon a dispute between owners; the majority may employ the vessel, giving a stipulation for her safe return, if the dissenting owners apply for it in the admiralty; if the majority decline to employ her, the minority may do so on the like terms. *Steamboat Orleans v. Phœbus*, 11 P. 175....xii. 891.

### D. BILLS OF LADING AND CHARTER-PARTIES, AND THE RIGHTS AND LIABILITIES ARISING THEREFROM.

*Supra*, B.

1. Damage done to cotton thread, by dampness of the hold of the vessel, not occasioned by bad stowage, or any negligence of the master, or mariners, is an "accident of navigation," within the exception in a bill of lading. *Clark v. Barnwell*, 12 H. 272....xix. 180.

2. If damage be done by an accident, or peril, excepted in the bill of lading, the shipper must *prima facie* bear the loss; but he may impose it on the master or owners, or on the vessel, by proving that the negligence of the master, or mariners, made the excepted peril or accident operative on his goods. *Ib.*

3. If it is usual to carry salt as part of the cargo of a general ship, it is not negligence to take it on board; and the owner of goods, liable to be injured by its presence in the hold, must bear the loss occasioned thereby, if there was no bad stowage, and no inquiry made by the shipper, before the goods were put on board. *Ib.*

4. A carrier is not responsible for the consequences of delay of the voyage not attributable to misconduct of his servants. *Ib.*

5. A bill of lading, containing the usual clause, "shipped in good order, &c.," and adding "contents unknown," acknowledges only the fair external appearance of the packages, and the burden is on shipper to prove the condition of their contents when they came on board. *Ib.*

6. A question of fact as to the cause of damage to goods in the hold of a vessel. *Rich v. Lambert*, 12 H. 347....xix. 171.

7. A bill of lading, stating the property to belong to A and B, is not conclusive evidence, and does not estop A from showing the property to belong to another. *Maryland Ins. Co. v. Ruden's Administrator*, 6 C. 388....ii. 426.

8. There is no implied warranty by the owners, that the vessel shall prove sufficiently buoyant to carry cargo placed on deck under a contract with the shipper. He takes the risk of perils, arising solely from that place of stowage in which he agreed his property should be carried. *Laurence v. Minturn*, 17 H. 100 . . . . xxi. 392.

#### E. MASTER.

1. A sale, by the master, of a stranded vessel, made in good faith, from necessity, is valid. *New England Ins. Co. v. The Sarah Ann*, 13 P. 387 . . . . xix. 215.

2. Good faith includes the use not only of his best discretion and judgment concerning the necessity of the sale, but the acquisition of the best local information in his power, bearing on the emergency, and the previous employment of any and all reasonable means at his command, to get the vessel afloat and out of danger. *Ib.*

3. The necessity must arise from an impending peril, to which the vessel is exposed in her then condition, from which the master has no reasonable means of relieving her, and by which, it is probable, in the opinion of persons competent to judge, that the vessel, if not relieved, will be destroyed. *Ib.*

4. The mere facts that, as events turned, the vessel was relieved, and that the cost of her repairs and removal was not very great, will not disprove the necessity for a sale, or the competency of the master or of his advisers. *Ib.*

5. The power of the master to sell is not limited to cases of necessity in foreign countries, or even out of the limits of the State where the owners reside; but he should not sell in any case without first giving notice to his owners, if the circumstances admit of the necessary delay. *Ib.*

6. He may sell the sails and rigging, though landed, if a sound discretion requires them to be sold when the hull is sold. *Ib.*

7. To justify a sale of a vessel insured, necessity and good faith on the part of the master, must concur; and the necessity is not to be inferred from a sale by a skilful master acting in good faith; it must be determined from the other circumstances. *Patapsco Ins. Co. v. Southgate*, 5 P. 604 . . . . ix. 490.

8. Though the master may compromise or refer a question of salvage, where he cannot consult his owners, without injurious delay, yet his conduct will be closely scrutinized, and his contracts will not bind the owners, unless they appear to have been such as a discreet owner would have made in similar circumstances, and the burden is on those who set up his authority. *Houseman v. Cargo of the Schooner North Carolina*, 15 P. 40 . . . . xiv. 15.

9. If he referred to arbitrators, it must be shown that the referees were suitable persons, and their proceedings fair. *Ib.*

10. Though the master of a steamboat is, *prima facie*, the agent of the owner to do only what is usually done by such masters in such employment, yet different employments may and do have different usages, and thus confer on masters different powers. And where it was usual to permit persons whose employment was on board such boats, to go from place to place free of charge, a person so carried was held to be lawfully on board, and that for an injury done to him by culpable negligence in the management of the steam, the owners were liable in damages. *Steamboat New World v. King*, 16 H. 469 . . . . xxi. 260.

11. The master has no lien on the vessel for wages. *Steamboat Orleans v. Phœbus*, 11 P. 175 . . . . xii. 391.

#### F. MARINERS. (CONSTITUTIONAL LAW, A. 14, 15.)

1. Seamen who contracted for a legal voyage, and were carried on an illegal one, and thereby subjected to imprisonment in a foreign port, were held entitled to their wages, from the time of their shipping on the voyage to the time of their return to the United States, deducting their advance wages, and any thing earned in an intermediate employment. *Sheppard v. Taylor*, 6 P. 675 . . . . ix. 581.

2. Their lien attaches upon moneys paid by a foreign government as indemnity for the wrongful seizure of the vessel and the loss of the freight, and may be enforced by a libel in the admiralty against those proceeds, though in the hands of assignees with notice of their claim. *Ib.*

3. Under the circumstances, interest was allowed from the time the proceeds were received by the assignees, who were permitted to deduct certain expenses of recovering the proceeds, and also a commission for their services. *Ib.*

4. The claim of seamen for wages, on a voyage undertaken in violation of the slave-trade acts, out of the proceeds of the forfeited vessel in the registry rejected. *The St. Jago de Cuba*, 9 W. 409 . . . . vi. 110.

5. The claim of seamen for wages, and of material-men for supplies, where the parties were innocent of all knowledge of, or participation in the illegal voyage, preferred to the claim of forfeiture on the part of the government. *Ib.*

#### G. BARRATRY.

Whether the risk of barratry is taken, or not, a loss whose proximate cause was a peril insured against, is within the policy, though remotely occasioned by the negligence of the officers and crew. *Waters v. Merchants Louisville Ins. Co.* 11 P. 213 . . . . xii. 400.

#### INSURANCE, F. 11.

#### H. FREIGHT. (CAPTURE, G.; INSURANCE, H. 2.)

1. Freight *pro rata itineris*, is due only when there is a voluntary acceptance of the goods at an intermediate port. *Caze v. Baltimore Ins. Co.* 7 C. 358 . . . . ii. 569.

2. Under a charter-party containing a covenant that the charterer will pay to the owner, on the return of the ship to Philadelphia, and before the discharge of her cargo there, in approved notes, the sum stipulated for as charter money, it is not in the power of the charterer and the master, while at a foreign port, to waive this lien on the charterer's goods, or postpone it to another lien in favor of one who advances funds to the charterer to enable him to buy the cargo, the charterer not being made owner *pro hac vice*, by the charter-party. *Gracie v. Palmer*, 8 W. 605 . . . . v. 523.

3. Under a charter-party for a voyage from London direct, or thence to Cardiff in Wales, to load for port or ports on the Pacific, where the vessel was

to be employed between such ports as the charterers might elect, for the full term of fifteen months, with a privilege to the charterers to extend the time to twenty-four months, the hire being at the rate of \$2,000 a month, payable in New York, semi-annually; *held*, the owners had not a lien on the outward cargo from Cardiff to the Pacific, for the first six months' hire of the vessel, which became due at New York before the arrival of the vessel at the port of delivery in the Pacific. *Raymond v. Tyson*, 17 H. 53....xxi. 362.

#### I. REPAIRS AND SUPPLIES. (ADMIRALTY, A. 2.)

1. Though the admiralty has a general jurisdiction to enforce liens of material men, yet the libellant must show that a lien exists by law in the particular case; and by the common law the lien is confined to foreign vessels, and such as are in the possession of the material man. *The General Smith*, 4 W. 438... iv. 440.

2. An express contract does not waive a lien unless it contains stipulations from which a waiver of the lien may fairly be inferred. *Peyroux v. Howard*, 7 P. 324....x. 506.

3. Giving a credit beyond the time when a vessel may be expected to sail, is a waiver of a lien under a local law, which provides that the lien shall cease if the vessel be allowed to depart without asserting it. *Ib.*

### SIGNATURE.

Under the laws of Louisiana, a mark may be a signature. *Zacharie v. Franklin*, 12 P. 151....xii. 670.

### SLAVES.

#### A. GENERALLY, 483.

#### B. IN SEVERAL STATES AND THE DISTRICT OF COLUMBIA, 484.

1. VIRGINIA.

2. MARYLAND.

3. MISSISSIPPI.

#### A. GENERALLY.

1. The rule of *partus sequitur ventrem* is universally followed, unless there be something in the terms of the instrument which disposes of the mother, separating the issue from her. *Williamson v. Daniel*, 12 W. 568....vii. 362.

2. In an action for the penalty under the 4th section of the act of February 12,

1793, (1 Stats. at Large, 302,) respecting fugitives from labor, it was *held*:—

1. That notice of the fact that the person harbored was such fugitive, need not be in writing, nor published in a newspaper, but might be acquired from the slave himself, and need not be preceded or accompanied by a claim. *Jones v. Van Zandt*, 5 H. 215....xvi. 366.

3. 2. That taking the fugitive into a covered wagon, and driving him about twelve miles in the night, to aid his escape, was “harboring” him within the meaning of the act; as is any overt act which shows an intention to elude the master or his agent, and is calculated to attain that end. *Ib.*

4. 3. That the subsequent recovery of a slave did not vary the prior harboring, or bar the action for the penalty. *Ib.*

5. 4. That the allegations in this declaration were sufficient in the four particulars objected to. *Ib.*

6. 5. That this law is constitutional, is among the settled adjudications of this court. *Ib.*

7. 6. That the ordinance of 1787, for the government of the territory northwest of the River Ohio, is not in conflict with this act. *Ib.*

8. Where the owner of certain slaves, and also part-owner of a vessel, hired the slaves to the master of the vessel to proceed as mariners on board, on a voyage, at the usual wages, and without any special contract of hiring; *held*, that the master, having acted with good faith, was not responsible for the escape of the slaves in a foreign port, which was one of the contingent *termini* of the voyage, and, consequently, within the hazards to which the owner knew his property might be exposed; although it was doubtful whether the master had strictly pursued his orders in going to such port. *Beverly v. Brooks*, 2 W. 100....iv. 44.

9. A question of fact respecting the ownership of slaves. *Amis v. Myers*, 16 H. 492....xxi. 274.

#### CONSTITUTIONAL LAW, F. 1–3.

### B. IN SEVERAL STATES.

#### 1. VIRGINIA.

1. Under the statute of Virginia, emancipating slaves brought into that State, unless the owner removing with them should take a certain oath within sixty days after such removal, the fact of the oath having been taken may be presumed by the lapse of twenty years, accompanied with possession. *Mason v. Matilda*, 12 W. 590....vii. 379.

2. Under the act of assembly of Virginia, of December 17, 1792, a slave did not become free by being brought into that State, if his master, within one year thereafter, removed thither to reside, and took the oath prescribed by the law. *Scott v. Negro London*, 3 C. 324....i. 595.

3. By the act of assembly of Virginia, of 1758, no gift of a slave was valid, unless in writing and recorded; but parol evidence may be given of the existence of a deed of gift, to show the nature of possession which accompanied

the deed. *Spiers v. Willison*, 4 C. 398....ii. 151; *Ramsay v. Lee*, 4 C. 401....ii. 152.

4. Five years' adverse possession of a slave in Virginia, gives a good title, upon which trespass may be maintained. *Brent v. Chapman*, 5 C. 358....ii. 292.

## 2. MARYLAND.

1. The act of assembly of Maryland, which prohibits the importation of slaves "for sale or to reside," applies only to a permanent, not a temporary residence, and to an importation by the master and general owner, and not by a bailee for a short term. *Henry v. Ball*, 1 W. 1....iii. 443.

2. A bequest of slaves in Maryland, "provided he shall not carry them out of the State of Maryland, or sell them to any one; in either of which events I will and devise the said negroes to be free for life," was a valid conditional limitation of freedom to the slaves, and took effect as to one of them upon a sale of him by the legatee. *Williams v. Ash*, 1 H. 1....xiv. 476.

3. A bequest of freedom to a slave is, in Maryland, a specific legacy, and may be made upon the same conditions and limitations as the property in the slave may be limited over to a third person. *Ib.*

4. The right to freedom, under the act of Maryland which prohibits the bringing of slaves into that State, is not acquired by the neglect of the master to prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States, although such proof be required by the act. *Scott v. Negro Ben*, 6 C. 3....ii. 300.

5. A deed of manumission, in Maryland, and in the county of Washington, in the District of Columbia, not recorded within six months after its date, is void. *Miller v. Herbert*, 5 H. 72....xvi. 306.

6. A devise of property, real or personal, by a master to his slave, entitles the slave to freedom, by necessary implication, under the law of Maryland. *Le Grand v. Darnall*, 2 P. 664....viii. 246.

7. Under the law of Maryland, the manumission of a mother and an infant child, the former being in good health and able to maintain the latter, is allowed. *Wallingsford v. Allen*, 10 P. 583....xii. 255.

## DISTRICT OF COLUMBIA, 6.

## 3. MISSISSIPPI.

1. The provision in the constitution of Mississippi, of the year 1832, concerning the introduction of slaves for sale, is merely directory to the legislature, and is not operative as a law of prohibition, *proprio vigore*. *Groves v. Slaughter*, 15 P. 449....xiv. 137.

2. The statute of Mississippi, of June, 1822, respecting the sale of slaves brought into that State, does not make void a note given for the price of such slaves. *Harris v. Runnels*, 12 H. 79....xix. 38.



## SLAVE-TRADE.

## ADMIRALTY, B. 1.

1. Under the slave-trade act of March 2, 1807, (2 Stats. at Large, 426,) which requires a manifest to be delivered to the collector or surveyor of one port, an allegation that a manifest was not delivered to the collector or surveyor of two ports, is defective. *The Mary Ann*, 8 W. 380 . . . v. 452.

2. Negroes, who had lawfully regained their liberty by taking possession of a Spanish vessel, on board which they were illegally confined, are not within the act of March 3, 1819, (3 Stats. at Large, 532,) and are not to be transported to the coast of Africa, though taken possession of, and brought into the United States by a public vessel of the United States. *United States v. The Amistad*, 15 P. 518 . . . xiv. 156.

3. In such a case salvage, amounting to one third of the vessel and cargo, was allowed. *Ib.*

4. The slave-trade acts of May 10, 1800, (2 Stats. at Large, 71,) and April 20, 1818, (3 Stats. at Large, 450,) extend to the carrying of slaves as freight from one port to another in the same foreign kingdom. *The Merino, The Constitution, The Louisa*, 9 W. 391 . . . vi. 102.

5. Under the 4th section of the act of May 10, 1800, the owner of the slaves, transported contrary to the provisions of that act, cannot claim the same in a court of the United States, although they may be held in servitude according to the laws of his own country. But if, at the time of the capture by a commissioned vessel, the offending ship was in possession of a non-commissioned captor, who had made a seizure for the same offence, the owner of the slaves may claim; the section only applying to persons interested in the enterprise or voyage in which the ship was employed at the time of such capture. *Ib.*

6. Under the slave-trade act of 1794, (1 Stats. at Large, 347,) the forfeiture attaches where the original voyage is commenced in the United States, and there was only a pretended transfer to a Spanish subject; and the commencement of a new voyage in a Spanish port, was held not to be sufficient to break the continuity of the original adventure, and to avoid the forfeiture. *The Plattsburgh*, 10 W. 138 . . . vi. 350.

7. It is not necessary, to incur the forfeiture under the slave-trade acts, that the equipments for the voyage should be completed. It is sufficient if any preparations are made for the unlawful purpose. *The Plattsburgh*, 10 W. 133 . . . vi. 350; *The Emily and Caroline*, 9 W. 381 . . . vi. 98.

8. Slaves, illegally captured, were restored to a foreigner who showed himself to have been in possession at the time of the capture; the court being equally divided in opinion, and, consequently, the decree of the court below to that effect affirmed; but if no such proof of possession is made by any individual, the slaves must be delivered to the United States. *The Antelope*, 10 W. 66 . . . vi. 337.

9. Explanation of the former decree of the court in the same cause. *The Antelope*, 11 W. 413 . . . vi. 644.

10. The act of March 2, 1817, § 7, (2 Stats. at Large, 428,) does not confer upon the seizing officer a right to participate in the proceeds of vessels or cargoes seized for being engaged in the slave-trade. *The Josefa Segunda*, 10 W. 312 . . . vi. 414.

10a. Under the act of Louisiana, of March 13, 1818, only the commanding officer of a naval or revenue force is thus entitled. *Ib.*

11. To constitute the offences denounced in the second and third sections of the act of May 10, 1800, (2 Stats. at Large, 70,) it is not necessary that there should be an actual transportation of slaves in a vessel of the United States, or in a foreign vessel; it is enough that the vessel was bound to the coast of Africa, for the purpose of taking slaves on board, to be transported to some foreign country, and that the defendant, having knowledge of the business in which the vessel was thus employed, and being an American citizen, voluntarily served on board. *United States v. Morris*, 14 P. 464....xiii. 596.

12. Further explanation of the decree of this court, in S. C. 10 W. 56, and 11 W. 413. *The Antelope*, 12 W. 546....vii. 347.

13. The Africans captured, except those restored to the Spanish claimants to be delivered to the United States, absolutely and unconditionally, without the precedent payment of expenses. *Ib.*

14. Under an indictment framed on the slave-trade act of April 20, 1818, (3 Stats. at Large, 450,) it is sufficient that the owner, through his agents, fitted the vessel; and any preparations which clearly manifest and accompany an intent to prosecute a slave voyage, constitute such a fitting out as to be within the act. *United States v. Gooding*, 12 W. 460....vii. 281.

15. It is not necessary to charge in the indictment the particular acts of preparation. *Ib.*

16. The crime is a misdemeanor, all are principals, and the words "aid and abet" are not used technically in the act. *Ib.*

17. A fitting out within the jurisdiction of the United States must be averred. *Ib.*

18. An averment of an intent that the vessel should be employed is bad; it must be "with intent to employ." *Ib.*

19. It is competent for the court at the trial to hear objections to the indictment, but it is not proper, except under extraordinary circumstances. *Ib.*

20. Under the act of April 20, 1818, (3 Stats. at Large, 450,) a forfeiture is not incurred by bringing from France into Louisiana a colored person, who being held as a slave there, had gone to France with her mistress. The act cannot be applied to persons of color, domiciled in the United States, who, having gone abroad, are brought back to their home. *United States v. Skiddy*, 11 P. 73....xii. 342.

21. The act of congress of the 28th of February, 1803, to prevent the importation of certain persons into certain States, where, by the laws thereof, their admission is prohibited, is not in force in the territory of Orleans. *The Amiable Lucy v. United States*, 6 C. 330....ii. 422.

LAW OF NATIONS, D. 9.

## SPECIFIC PERFORMANCE AND RESCISSION

EQUITY, B. b. 1; VENDOR AND PURCHASER.

A. WHEN DECREED OR REFUSED, 488.

B. TERMS, 491.

## A. WHEN DECREED OR REFUSED.

1. When a purchaser goes into possession, the vendor is his trustee for the title, and his *cestui que trust* for the purchase-money ; and in this case the court enforced both trusts after the lapse of more than twenty years, under peculiar circumstances, though there was no special prayer for such a decree. *Boone v. Ohiles*, 10 P. 177 . . . .xii. 68.

2. The general rule of equity is, that time is not of the essence of a contract of sale ; and a failure on the part of the purchaser, or vendor, to perform his contract on the stipulated day, does not of itself deprive him of his right to a specific performance, when he is able to comply with his part of the engagement. *Brashier v. Gratz*, 6 W. 528 . . . .v. 149.

3. Though time may be expressly made of the essence of a contract, or may appear to be so from the circumstances, and though laches is a bar to specific performance, yet, generally, time is not so treated by a court of equity ; and in the absence of negligent delay, or delay unaccounted for, relief by specific performance is given, though the time named in the contract has expired. *Taylor v. Longworth*, 14 P. 172 . . . .xiii. 414.

4. Where time is not of the essence of the contract, specific performance will not be decreed if there has been delay amounting to laches on the part of the complainant, and especially if the value of the property has changed and new interests intervened. *Holt v. Rogers*, 8 P. 420 . . . .xi. 147.

5. Bill for the specific performance of an agreement for the exchange of lands. The contract enforced. *M'Iver v. Kyger*, 3 W. 53 . . . .iv. 160.

6. The complainants, having purchased in good faith from a grantor having no title, but who afterwards bargained with the defendant, the true owner of the title, for a confirmation upon payment of £420, it was *held* :—1. That the complainants must pay the £420 before they could compel the defendant to make a title. 2. That until the complainants had notice of this obligation to pay the £420, they were not liable to pay interest. 3. That they were not guilty of *laches* for not coming into equity while they were in possession of the land in good faith. 4. That their suit could not be defeated by their failure to tender the £420 before filing their bill. *Buchannon v. Upshaw*, 1 H. 56 . . . .xiv. 498.

7. On a bill for specific performance by a vendor, the vendee having signed the contract with a belief that he could relieve himself from its performance by paying the stipulated penalty of \$1,000, and the vendor being made aware at the time that the vendee so understood the effect of the contract, and having assented to a reduction of the penalty, at the suggestion of the vendee, to enable him to relieve himself from the contract by forfeiting a less sum, and the price of the property being very high : *Held*, 1. That the mere excess of price over what appeared to be the just value at the time, was not a bar to specific performance. *Cathcart v. Robinson*, 5 P. 264 . . . .ix. 328.

8. If it be at all doubtful whether a negotiation resulted in a concluded agreement, specific performance will not be decreed. *Carr v. Duval*, 14 P. 77 . . . .xiii. 354.

9. In this case, it was held that the treaty had not resulted in an agreement,

on the grounds that a sale of the whole title was the subject, that the vendee knew the vendor was but a tenant in common, and had not power to bind his co-tenants, and had not accepted the vendor's offer precisely, in substance, as made. *Ib.*

10. A court of equity will not force a doubtful title on a purchaser; and in this case such defects were found as precluded the vendor from having a decree of specific performance by the vendee. *Watts v. Waddle*, 6 P. 389....x. 164.

11. Specific performance refused, on the ground of laches, and non-performance by the complainants, and loss of title. *Boone v. Missouri Iron Company*, 17 H. 340....xxi. 537.

12. If a vendor has conveyed, and the deed is not lost, but lacks some legal formality to pass the legal title, the vendee may have relief in equity, by a decree for specific performance, against the vendor, and those claiming under him with notice. *Findlay v. Hinde*, 1 P. 241....vii. 552.

13. A vendor may compel a specific execution of a contract for the sale of land, if he is able to give a good title at the time of the decree, although he had not a good title at the time when, by the contract, the land ought to have been conveyed. *Hepburn v. Auld*, 5 C. 262....ii. 251.

14. Upon a bill for specific performance of a contract to convey land, *held*, that the complainant was not entitled to a decree. 1. Because he had shown no performance or offer to perform, on his own part. 2. Because an agreement to convey in consideration of payments to be made out of the profits of the vendor's lands, was not a contract which a court of equity would enforce. 3. That the complainant had abandoned and released his claim. *Dorsey v. Packwood*, 12 H. 126....xix. 61.

15. A bill alleged that the fraud was not discovered till a certain time, and notice was forthwith given of the discovery to the vendor, that he might resume possession. *Held*, that as there was no ground, upon the evidence, to impute earlier notice to the vendee, he had not lost his right to rescind. *Boyce's Executors v. Grundy*, 3 P. 210....viii. 377.

16. A court of equity will decree a specific performance of a contract for the sale of land, if the vendor is able to make a good title at any time before the decree is pronounced; but the dismissal of a bill to enforce a specific performance in such a case, is a bar to a new bill for the same object. *Hepburn v. Dunlop*, 1 W. 179....iii. 509.

17. The inability of the vendor to make a good title at the time the decree is pronounced, though it forms a sufficient ground for refusing a specific performance, will not authorize a court of equity to rescind the agreement in a case where the parties have an adequate remedy at law for its breach. *Ib.*

18. There are many cases in which a court of equity will neither decree specific performance, nor cancellation of an agreement. *Ib.*

19. After a lapse of seven years, the court will refuse to decree a specific performance of a contract, in the part execution of which the complainants, or those under whom they claim, have expended large sums of money, although the first default was on the part of the defendant, and although it be probable that the failure of the defendant in that respect has prevented the completion of the execution of the contract on the part of the complainants; circumstances having so changed that neither party could derive, from the execution of the

contract, the benefits which were at first expected. *Pratt v. Carroll*, 8 C. 471 . . . .iii. 226.

20. But a court of equity will not compel a specific performance by the vendee, unless the vendor can make a good title to all the land contracted to be sold. *Hepburn v. Auld*, 5 C. 262 . . . .ii. 251.

21. In equity, time may be dispensed with, if it be not of the essence of the contract. *Ib.*

22. Equity cannot relieve where it is impossible to reinstate the parties, and real fault is imputable to the complainant. *Pratt v. Carroll*, 8 C. 471 . . . .iii. 226.

23. Where a contract was so drawn as legally to entitle a vendee to a large quantity of surplus land, which the court was satisfied was not known to the parties to exist, and the vendee had omitted to make his payments, so that he had not a strict legal right to a performance, upon a bill for specific performance: *Held*, 1. That though specific performance is decreed of course, where there is no legal or equitable defence, yet it is subject to sound judicial discretion, to be exercised with a view to substantial justice. *King v. Hamilton*, 4 P. 311 . . . .ix. 75.

24. That to have this aid, a party must show himself ready to perform, and to do equity. *Ib.*

25. Circumstances may be so changed that the party cannot be placed in the same situation as if the contract had been performed in due time. In such a case, a court of equity will leave the parties to their remedy at law. *Brashier v. Gratz*, 6 W. 528 . . . .v. 149.

26. Part performance will, under some circumstances, induce the court to relieve. *Ib.*

27. But a demand for specific performance after a considerable lapse of time by one who has totally failed to perform, after a great change in the title and value of the land, and when the complainant could not have been compelled to perform, is not sustainable. *Ib.*

28. It is a universal rule of equity, that he who asks for a specific performance must be in a condition to perform himself. *Morgan's Heirs v. Morgan*, 2 W. 290 . . . .iv. 110.

29. Therefore, the vendor being unable to make a title free from incumbrances, to all the lands sold in Kentucky, was held not to be entitled to a decree for a specific performance. *Ib.*

30. In order to obtain a specific performance of a contract, its terms should be so precise as that neither party can reasonably misunderstand them. *Colson v. Thompson*, 2 W. 836 . . . .iv. 126.

31. If the contract be vague and uncertain, or the evidence to establish it be insufficient, a court of equity will not enforce it, but will leave the party to his legal remedy. *Ib.*

32. The plaintiff, who seeks for the specific performance of an agreement, must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged undertaking on the part of the defendant. *Ib.*

33. A bill in equity, brought to rescind a purchase made under the decree of this court, in *Terrett v. Taylor*, 9 C. 48, upon the ground that the title to

the property was defective, and could not be made good by the vestry and other persons, who were parties to the former suit. Bill dismissed. *Mason v. Muncaster*, 9 W. 445....vi. 127.

34. The alienage of the vendee is an insufficient ground to entitle the vendor to a decree for rescinding a contract for the sale of lands. *Hepburn v. Dunlop*, 1 W. 179....iii. 509.

35. In a purchase of 950 acres, at \$20 an acre, a discrepancy between facts and representations which would add thirty-three per centum to the cost, is a case for rescission, not for compensation. *Boyce's Executors v. Grundy*, 3 P 210....viii. 377.

36. Relief by delivering up instruments is quite distinguishable from relief by specific performance of an executory contract. *Olarks v. White*, 12 P. 178....xii. 680.

37. A false affirmation of a material fact, though innocently made, is ground for a rescission, if the other party was misled by it. *Smith v. Richards*, 13 P. 26....xiii. 18.

38. A sale, "with all faults," of property at a distance, and unexamined by the purchaser, does not exempt the vendor from responsibility for positive assertions of material facts, on which the vendee relied, which turned out to be false. *Ib.*

## B. TERMS.

1. Where the vendor is indebted to the vendee, and the sale is made in order to pay the debt, the vendor must allow interest from the time the debt is liquidated until he offers to make a good title, and is accountable for the rents and profits from that time until the contract is specifically performed. *Hepburn v. Dunlop*, 1 W. 179....iii. 509.

2. That under the circumstances of this case performance should be decreed only on making additional compensation, and after deducting so much of the surplus land as had been sold to another. *King v. Hamilton*, 4 P. 311....ix. 75.

3. Explanation of the decree in this cause, (reported 1 W. 179,) that the defendants were only to be accountable for the rents and profits of the lands, referred to in the proceedings, actually received by them. *Dunlop v. Hepburn*, 3 W. 231....iv. 205.

4. That the vendor could not have the aid of a court of equity to enforce performance, if the vendee would pay the penalty. *Cathcart v. Robinson*, 5 P. 264....ix. 328.

5. Where the bill prayed specific performance and general relief, but made no special case for payment of a sum which the vendee was to receive on rescission, a decree for that sum was refused. *Holt v. Rogers*, 8 P. 420....xi. 147.

6. Where the defendant to a bill filed by the owner of the equitable title to lands, appeared to have the better equity to a part of the lands, it is competent for the court to direct the complainant to release that part of the land to the defendant, and thus remove a cloud from the title, and that the tenants thereof shall attorn to the defendant, as a condition for the relief granted to the complainant; and this, though there is no prayer in the answer to that effect; it is



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a modification of the relief of the complainant, necessary to do complete justice between the parties. *Walden v. Bodley*, 14 P. 156....xiii. 400.

7. In a case where it would be difficult to ascertain the injury resulting from the breach of contract, or the sum in damages, by which the injury might be compensated, this court will not themselves ascertain the injury nor the damages, nor direct an issue *quantum damnificatus*. *Pratt v. Law*, 9 C. 456....iii. 428.

8. Where a contract for the sale of land has been in part executed by a conveyance of part of the land, and the vendor is unable to convey the residue, a court of equity will sometimes decree the repayment of a proportionate part of the purchase-money with interest. *Ib.*

### SPOILIATION.

Where the claimant of goods, seized for a fraudulent violation of the revenue laws, has the burden of proof imposed upon him by the court, pursuant to the 71st section of the collection act of 1779, (1 Stats. at Large, 678,) it is not error for the judge to instruct the jury, that if the claimant has withheld the evidence of his accounts and transactions with the parties abroad, from whom he purchased the goods, they are at liberty to presume it would have operated unfavorably on his case, if produced. *Clifton v. United States*, 4 H. 242....xvi. 89.

EVIDENCE, K. 2.

### STALE CLAIMS.

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## STATE COURTS AND MAGISTRATES.

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#### A. AS TO JURISDICTION OF.

1. OVER PROCEEDINGS IN COURTS OF THE UNITED STATES.

JURISDICTION, C. 2.

A state court has no jurisdiction to enjoin a judgment of a circuit court of the United States. *M Kim v. Voorhies*, 7 C. 279....ii. 529.



## 2. AS TO PENALTIES AND FORFEITURES UNDER THE LAWS OF THE UNITED STATES.

The state courts have not jurisdiction to try a question of forfeiture, under the laws of the United States. *Gelston v. Hoyt*, 3 W. 246....iv. 211.

## 3. AS TO PERSONS AND PROPERTY IN THE CUSTODY OF THE LAW OF THE UNITED STATES, AND CHOSSES IN ACTION PENDING THEREIN.

1. Money in the hands of a disbursing officer of the United States, though due and payable by him to a private person, cannot be attached by process out of a state court. *Buchanan v. Alexander*, 4 H. 20....xvi. 10.

2. The discharge of a debtor committed on an execution out of a circuit court of the United States, for non-payment of prison fees, under the authority of a state law or by a state officer under a state insolvent law, was not legal. *McNutt v. Bland*, 2 H. 9....xv. 1.

3. The act of the State of Mississippi, granting the use of its jails to the United States, was intended to be in conformity with the resolution of congress on that subject, of September 23, 1789, (1 Stats. at Large, 96,) and consequently prisoners of the United States could be discharged only by due course of the laws of the United States. *Ib.*

4. A state officer, acting under a state insolvent law in a general proceeding for the benefit of creditors, cannot discharge from imprisonment a debtor arrested under a *ca. sa.* issuing out of a circuit court of the United States. *Duncan v. Darst*, 1 H. 301....xiv. 621.

FOREIGN ATTACHMENT, 5 ; INSOLVENT LAWS, B. 2 ; REVENUE LAWS.  
E. d. 2.

## 4. OTHER CASES.

1. The state courts have no jurisdiction to try, or give any effect to, an inchoate French or Spanish title. *Burgess v. Gray*, 16 H. 48....xxi. 25.

2. The supreme court of Mississippi had not jurisdiction to examine and declare the validity of an inchoate Spanish title, and its proceedings in that behalf were merely void. *Hickey's Lessee v. Stewart*, 3 H. 750....xv. 627.

3. The courts of Florida had not jurisdiction to receive a petition for the confirmation of a private land claim after May 26, 1831. *United States v. Marvin*, 3 H. 620....xv. 567.

4. When this court has declared a state law to be in conflict with the constitution of the United States, the courts of the State are bound to conform to that decision. *Cook v. Moffat*, 5 H. 295....xvi. 405.

5. *Ogden v. Saunders*, 12 Wheat. 213, did not decide that a state tribunal was bound by a law of the State repugnant to the constitution of the United States, which is the supreme law. *Ib.*

6. The act of the legislature of Maryland, of 1785, c. 72, § 5, does not confer a personal power on the chancellor, but enlarges the jurisdiction of his court. *Bank of the United States v. Ritchie*, 8 P. 128....xi. 46.

MANDAMUS, B. 2.

B. REMOVAL OF CASES FROM. (JURISDICTION, B. d.)

1. Under the 12th section of the judiciary act, if the damages claimed in the declaration exceed the sum of \$500, it is error for the state court to refuse the defendant's petition for a removal of the suit to the circuit court, upon the ground that it does not appear to the satisfaction of the court that the amount in controversy exceeded the sum of \$500. *Gordon v. Longest*, 16 P. 97....xiv. 198.

2. The sum demanded in the declaration is the amount in controversy. *Id.*

C. WRITS OF ERROR TO.

JURISDICTION, A. c.; ERROR.

STATE LAWS.

COMPACTS OF STATES; CONSTITUTIONAL LAW; LAWS OF THE SEVERAL STATES.

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C. CERTAIN SOVEREIGN RIGHTS, AND WHEN AND HOW ACQUIRED, 496.

A. SUITS BY AND AGAINST.

1. WHERE PARTIES. (EQUITY, B. g; JURISDICTION, A. a; PRACTICE, I. A. 1.)

1. If the defendant, having been duly served with process, does not choose to appear, or withdraws his appearance on leave, the complainant may proceed *ex parte*. *Rhode Island v. Massachusetts*, 12 P. 657....xii. 883.

2. Where a libel, in the admiralty, against the State of Georgia, stated in substance that the State was in possession of certain slaves and of the proceeds of the sales of certain others, in which the plaintiff had an interest, and that these slaves had been brought into the United States after an illegal capture, and had been taken possession of by the State; it was held that the libel could not be sustained. *Ex parte Madrazo*, 7 P. 627 . . . . x. 603.

3. Where the chief magistrate of a State is sued, not by his name, but in his official character, and the claim is made upon him solely by reason of his holding the office of governor, and no decree could be made against him personally, the State must be considered as the real party on the record. *The Governor of Georgia v. Madrazo*, 1 P. 110 . . . . vii. 481.

4. The court will not apply, to suits between States, the same rules, as to time of answering, which govern suits between individuals. *Rhode Island v. Massachusetts*, 13 P. 23 . . . . xiii. 16.

5. The proper mode of pleading in a suit between two States, to determine a question of boundary between them, is by bill and cross-bill, by which each party becomes an actor, and asserts its claims and pretensions in such a way that the court can decree where the true line is, and have it surveyed and marked when necessary. *Missouri v. Iowa. Iowa v. Missouri*, 7 H. 660 . . . xvii. 337.

6. Though twenty years is sufficient in equity to operate as a bar, between individuals, as to a land title, yet such a rule cannot be applied, as between States. All the circumstances must be considered and the amount and kind of acquiescence ascertained. *Rhode Island v. Massachusetts*, 15 P. 233 . . . . xiv. 81.

7. That portion of the boundary line between Rhode Island and Massachusetts, in dispute in this case, having been settled by a joint commission in 1711, whose acts were adopted by the two colonies, it is too late now to disturb this line of compromise upon an allegation of mistake, which is not clearly made out. *Rhode Island v. Massachusetts*, 4 H. 591 . . . . xvi. 210.

8. Though suits between States, to determine questions of disputed boundary, are to be conducted according to the rules of pleading and practice of the court of chancery, yet they are to be so moulded and applied as to bring the cause to a hearing on its entire merits, and it will not be decided on any merely technical principles of chancery pleading. *Rhode Island v. Massachusetts*, 14 P. 210 . . . . xiii. 429.

9. Where a decision upon a plea by a State to a bill by another State concerning boundary, might have the effect to keep out of view some part of the merits of the complainant's case, the court refused to decide the cause on the plea. *Ib.*

10. In a suit between Florida and Georgia, to settle a part of the boundary line between those States, the United States, as a proprietor and grantor of lands in the disputed territory, having an interest in the question of the location of the line, the attorney-general, on filing an information, had leave to adduce evidence, written or parol, and to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States. *Florida v. Georgia*, 17 H. 478 . . . . xxi. 621.

## 2. WHERE INTERESTED BUT NOT PARTIES. (PRACTICE, I. A. 1.)

1. The fact that a State has an interest in the subject-matter of a suit between individuals, which it may choose to assert, does not oust the courts of the United States of jurisdiction. *United States v. Peters*, 5 C. 115....ii. 206.

2. If such an interest is suggested as would make the State a necessary party, the suggestion must be examined, and its correctness determined by the court. *Ib.*

3. An action may be maintained in a circuit court against a bank of which a State is proprietor. *Bank of the Commonwealth of Kentucky v. Wister*, 2 P. 818....viii. 123.

4. The prohibition to sue a State, contained in the 11th amendment of the constitution, does not extend to cases in which a State is not made a party on the record, even if the State has the entire ultimate interest in the subject of the suit. *Osborn v. Bank of United States*, 9 W. 738....vi. 251.

## B. RIGHTS AND POWERS IN REFERENCE TO SOME PARTICULAR SUBJECTS.

## COURTS OF THE UNITED STATES, B. a. 1.

1. The fact that a State is one of the stockholders in a banking corporation, does not prevent the corporation from being sued in the courts of the United States. *Bank of the United States v. Planter's Bank of Georgia*, 9 W. 904....vi. 304.

2. The fact that a State is the sole owner of the stock of a banking corporation, does not affect the rights of its creditors. *Curran v. Arkansas*, 15 H. 304....xx. 524.

3. When a State becomes a stockholder in a banking corporation, it imparts none of its attributes of sovereignty to the latter, and can, as a stockholder, exercise no other power than any other holder of stock to the same amount. *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 P. 257....xii. 418.

## C. CERTAIN SOVEREIGN RIGHTS, AND WHEN AND HOW ACQUIRED.

1. When the Revolution took place, the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters, and the soils under them. *Martin v. Waddell's Lessee*, 16 P. 367....xiv. 345.

2. The State of Alabama, when admitted into the Union, became entitled to the soil under the navigable waters within the limits of the State not previously granted. *Pollard's Lessee v. Hagan*, 8 H. 212....xv. 391.

3. Though by the act of February 20, 1811, (2 Stats. at Large, 641,) certain restrictions were imposed on the convention which was to form the constitution of Louisiana, in respect to what that constitution should contain, yet when by the act of April 8, 1812, (2 Stats. at Large, 701,) Louisiana was admitted into the Union, "on an equal footing with the original States," congress

must be considered to have been satisfied those restrictions had been observed, in forming the constitution, and it is no longer a question under any law of the United States, whether an individual has been injured by a violation of a right intended to be secured by those restrictions. *Permoli v. First Municipality of New Orleans*, 8 H. 589 . . . . xv. 561.

## STATUS OF PERSONS.

CONFLICT OF LAWS, D.; DOMICILE; SLAVES.

## STATUTES.

- A. WHEN A STATUTE TAKES EFFECT, 497.
- B. REPEAL AND EXPIRATION OF STATUTES, 497.
  - 1. REPEAL BY IMPLICATION.
  - 2. EFFECT OF REPEAL BY EXPIRATION.
- C. CONSTRUCTION, 498.
- D. DECLARATORY ACTS, 499.

### A. WHEN A STATUTE TAKES EFFECT.

A statute is operative from its date, if its operation is not postponed by some law. *Matthews v. Zane*, 7 W. 164 . . . . v. 244.

### B. REPEAL AND EXPIRATION OF STATUTES.

#### 1. REPEAL BY IMPLICATION. (REVENUE LAWS, E. c.)

1. There must be a positive repugnancy between the provisions of the new law and the old, to work a repeal by implication, and even then, the old law is only repealed to the extent of such repugnancy. *Wood v. United States*, 16 P. 342 . . . . xiv. 336.

2. The 4th section of the act of February 12, 1793, (1 Stats. at Large, 305,) respecting fugitives from service, is repealed, so far as it relates to the penalty, by the act of September 18, 1850, (9 Stats. at Large, 462,) and an action for the penalty, pending at the time of the repeal, is barred. *Norris v. Crocker*, 18 H. 429 . . . . xix. 575.

#### 2. EFFECT OF REPEAL BY EXPIRATION.

1. A vessel having violated a law of the United States, cannot be seized for such violation, after the law has expired, unless some special provision be made therefor by statute. *United States v. The Helen*, 6 C. 203 . . . . ii. 371.

2. An offence against a temporary act cannot be punished after the expiration of the act, unless some provision for that purpose be made; and a proviso

in a law, which repeals the temporary act, that persons may be punished for past offences as if the law had not been repealed, is not such a provision. *The Irresistible*, 7 W. 551....v. 323.

APPEAL, A. 28, E. 10-12.

### C. CONSTRUCTION.

ADMIRALTY, B. 1; LAWS OF THE SEVERAL STATES, B. 2; REVENUE LAWS, B.

1. The preamble of an act may be resorted to, to aid in the construction of the enacting clause, when any ambiguity exists. *Beard v. Rowan*, 9 P. 301....xi. 367.

2. Where the language of the statute is clear, it is not for the court to say it embraces cases not described, because no reason is seen why they were not included. *Denn v. Reid*, 10 P. 524....xii. 228.

3. The surrounding circumstances considered, and allowed to give a construction to an act of congress making a grant of land. *Lessieur v. Price*, 12 H. 59....xix. 31.

4. The act of June 27, 1798, (1 Stats. at Large, 573,) to punish frauds committed on the Bank of the United States, is so repugnant as to be insufficient to support an indictment. *United States v. Cantril*, 4 C. 167....ii. 57.

5. The act of assembly of Maryland, which authorized the commissioners of the city of Washington to resell lots for default of payment by the first purchaser, contemplates a single resale only; and by that resale the power given by the act is executed. *Oneale v. Thornton*, 6 C. 53....ii. 318.

6. A repealing act, and an act suspending it, passed at the same session, are to be construed so that both may have effect, if possible. *Brown v. Barry*, 3 D. 365....i. 261.

7. The Virginia act of 1785, declaring the commencement of acts to be from the day on which they in fact pass, does not apply, because both laws were passed at the same session, and the question is, whether one changes the other, and this is the special case provided for by the 3d section of the act of 1789. *Ib.*

8. Where the act of 1785 does not apply, the rule in the British parliament, that acts of the same session have effect from the same day, obtains in Virginia. *Ib.*

9. A proviso, in a statute, is strictly construed, and takes no case out of the enacting clause, which is not fairly within the terms of such proviso. *United States v. Dickson*, 15 P. 141....xiv. 54.

10. In the construction of a doubtful law, the contemporaneous construction of persons appointed to execute it, is entitled to great respect. *Edwards's Lessee v. Darby*, 12 W. 206....vii. 126.

11. Even a penal law should not be construed so strictly as to defeat the obvious intention of the legislature. *American Fur Company v. United States*, 2 P. 358....viii. 137.

12. A legislative act, unlike a deed of a private person, may confirm and make valid a void conveyance. Whether it does so, is to be determined, not by a technical construction of the word used, but by ascertaining the actual intent of the legislature. *Wilkinson v. Leland*, 2 P. 627 . . .viii. 238.

13. The 9th section of the act of assembly of North Carolina, passed in 1715, concerning the proving of wills, &c., was repealed by the act of 1789, c. 28, and the declaration to the contrary, contained in the act of 1799, c. 26, is inoperative as to cases before the passage of this last-mentioned law. *Ogden v. Blackledge*, 2 C. 272 . . . i. 490.

14. Certain special acts of the State of Indiana as to lands given for the establishment of a county seat, examined and applied. *Sargeant v. State Bank of Indiana*, 12 H. 871 . . . xix. 190.

PARTITION, 5.

D. DECLARATORY ACTS.

Though a mistaken opinion of the legislature concerning the law does not make the law, yet it may be so declared as to operate *in futuro*. *Postmaster-General of the United States v. Early*, 12 W. 186 . . . vii. 86.

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- 1789, July 20, Tonnage Duties. 1 Stats. at Large, 27.  
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- 1789, August 7, Department of War. 1 Stats. at Large, 49.  
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- 1789, August 7, Government of Territory northwest of the Ohio. 1 Stats. at Large, 50.  
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- 1789, September 22, Post-Office. 1 Stats. at Large, 70.  
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 1841, September 11, Duties. 5 Stats. at Large, 463.  
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 s. 2, p. 464. Stuart v. Maxwell, 16 H. 150....xxi. 61.  
 1842, July 6, Louisiana Land Claims. 5 Stats. at Large, 491.  
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 1842, August 29, Judiciary. 5 Stats. at Large, 539.  
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1842, August 30, Revenue. 5 Stats. at Large, 548.

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*Marriott v. Brune*, 9 H. 619....xviii. 283.

*Tremlett v. Adams*, 13 H. 295....xix. 507.

*Maillard v. Lawrence*, 16 H. 251....xxi. 115.

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s. 9, p. 560. *Passenger Cases*, 7 H. 283....xvii. 122.

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s. 28, p. 566. *License Cases*, 5 H. 504....xvi. 513.

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1843, February 18, Resolution, Water-rotted Hemp. 5 Stats. at Large, 648.

*License Cases*, 5 H. 504....xvi. 513.

1843, March 1, Arkansas Land Titles. 5 Stats. at Large, 603.

s. 3, p. 603. *Thredgill v. Pintard*, 12 H. 24....xix. 15.

1843, March 3, Security of Passengers in Steam Vessels. 5 Stats. at Large,  
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*New Jersey Steam Navigation Company v. Merchants' Bank*, 6 H.  
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1843, March 3, Relief of William Gale. 6 Stats. at Large, 895.

*Bloomer v. Quewan*, 14 H. 539....xx. 326.

1844, May 31, Judiciary. 5 Stats. at Large, 658.

*Cary v. Curtis*, 3 H. 236....xv. 409.

*United States v. Carr*, 8 H. 1....xvii. 476.

1844, June 17, Missouri Land Claims. 5 Stats. at Large, 676.

*De Armas's Heirs v. United States*, 6 H. 103....xvi. 615.

*United States v. Curry*, 6 H. 106....xvi. 617.

*United States v. McIntyre*, 6 H. 605....xvi. 836.

*United States v. Boisdoré's Heirs*, 7 H. 658....xvii. 336.

*United States v. King*, 7 H. 833....xvii. 425.

*United States v. Boisdoré's Heirs*, 8 H. 113....xvii. 517.

*United States v. Reynes*, 9 H. 127....xviii. 65.

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*United States v. Philadelphia and New Orleans*, 11 H. 609....xviii.  
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 United States *p.* Rillieux's Heirs, 14 H. 189....xx. 127.  
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 1845, February 26, Appropriations. 5 Stats. at Large, 727.  
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 1845, February 26, Extension of Patent to Wm. Woodworth. 6 Stats. at Large, 936.  
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 Bloomer *v.* McQuewan, 14 H. 539....xx. 326.  
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 1845, March 1, Resolution, Admission of Texas into the Union. 5 Stats. at Large, 797.  
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 League *v.* De Young, 11 H. 185....xviii. 598.  
 1845, March 3, Post-Office. 5 Stats. at Large, 732.  
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 s. 10, p. 736. United States *v.* Bromley, 12 H. 88....xix. 48.  
 1845, March 3, Admission of Iowa and Florida into the Union. 5 Stats. at Large, 742.  
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 Carter *v.* Bennett, 15 H. 354....xx. 558.  
 s. 4, p. 743. Webster *v.* Reid, 11 H. 437. xviii. 678.

- 1845, March 3, Admission of Florida and Iowa into the Union. 5 Stats. at Large, 788.  
     *Benner v. Porter*, 9 H. 285 . . . . xviii. 121.  
     *Forsyth v. United States*, 9 H. 571 . . . . xviii. 266.
- 1845, December 29, To extend Laws of United States over Texas. 9 Stats. at Large, 1.  
     *Calkin v. Cocke*, 14 H. 227 . . . . xx. 151.
- 1845, December 31, Texas, a Collection District. 9 Stats. at Large, 2.  
     *Calkin v. Cocke*, 14 H. 227 . . . . xx. 151.
- 1846, February 6, Post Routes, 9 Stats. at Large, 3.  
     *Calkin v. Cocke*, 14 H. 227 . . . . xx. 151.
- 1846, February 11, Collectors, &c. 9 Stats. at Large, 3.  
     *Hoyt v. United States*, 10 H. 109 . . . . xviii. 315.  
     s. 3, p. 3. *Ring v. Maxwell*, 17 H. 147 . . . . xxi. 418.
- 1846, February 20, Orphans' Court in District of Columbia. 9 Stats. at Large, 4.  
     *Ennis v. Smith*, 14 H. 400 . . . . xx. 251.
- 1846, May 13, War with Mexico. 9 Stats. at Large, 9.  
     *Fleming v. Page*, 9 H. 603 . . . . xviii. 278.
- 1846, May 20, Resolution, Mail Service in Texas. 9 Stats. at Large, 110.  
     *Calkin v. Cocke*, 14 H. 227 . . . . xx. 151.
- 1846, May 29, Post Routes. 9 Stats. at Large, 15.  
     *Calkin v. Cocke*, 14 H. 227 . . . . xx. 151.
- 1846, July 9, Retrocession of Alexandria to Virginia. 9 Stats. at Large, 35.  
     *Nutt v. Minor*, 14 H. 464 . . . . xx. 287.
- 1846, July 30, Duties. 9 Stats. at Large, 42.  
     *License Cases*, 5 H. 504 . . . . xvi. 513.  
     *Lawrence v. Allen*, 7 H. 785 . . . . xvii. 407.  
     *DeForest v. Lawrence*, 13 H. 274 . . . . xix. 495.  
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     *Cross v. Harrison*, 16 H. 164 . . . . xxi. 66.  
     s. 3, p. 43. *Stuart v. Maxwell*, 16 H. 150 . . . . xxi. 61.  
     s. 6, p. 43. *Tremlett v. Adams*, 13 H. 295 . . . . xix. 507.  
     s. 8, p. 43. *Marriott v. Brune*, 9 H. 619 . . . . xviii. 283.  
     *Greely v. Thompson*, 10 H. 225 . . . . xviii. 377.  
     *Maxwell v. Griswold*, 10 H. 242 . . . . xviii. 385.  
     *Bartlett v. Kane*, 16 H. 263 . . . . xxi. 122.  
     *United States v. Sixty-seven Packages of Dry Goods*, 17 H. 85 . . . . xxi. 383.  
     *Ring v. Maxwell*, 17 H. 147 . . . . xxi. 418.  
     s. 11, p. 44. *Passenger Cases*, 7 H. 283 . . . . xvii. 122.  
     *Binns v. Lawrence*, 12 H. 9 . . . . xix. 7.  
     s. 11, pp. 44-46. *Fleming v. Page*, 9 H. 603 . . . . xviii. 278.  
     s. 11, Schedules C. D. p. 44, 46. *Maillard v. Lawrence*, 16 H. 251 . . . . xxi. 115.  
     s. 11, p. 49. *Oldfield v. Marriott*, 10 H. 146 . . . . xviii. 328.
- 1846, August 3, Preëemption. 9 Stats. at Large, 51.  
     *Foley v. Harrison*, 15 H. 433 . . . . xx. 539.

- 1846, August 6, Warehousing. 9 Stats. at Large, 53.  
*Lawrence v. Caswell*, 13 H. 488....xix. 612.  
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- 1846, August 6, Admission of Wisconsin into the Union. 9 Stats. at Large, 56.  
 s. 4, p. 57. *McNulty v. Batty*, 10 H. 72....xviii. 300.
- 1846, August 9, Grant to Iowa. 9 Stats. at Large, 77.  
*Missouri v. Iowa*, 7 H. 660....xvii. 337.
- 1846, December 28, Admission of Iowa into the Union. 9 Stats. at Large, 117.  
*Missouri v. Iowa*, 7 H. 660....xvii. 337.
- 1847, February 15, Relief of Thomas Blanchard. 9 Stats. at Large, 688.  
*Bloomer v. McQuewan*, 14 H. 539....xx. 326.
- 1847, February 22, Appellate Jurisdiction, Supreme Court of the United States.  
 9 Stats. at Large, 128.  
*Sheppard v. Wilson*, 5 H. 210....xvi. 362, n.  
*Sheppard v. Wilson*, 6 H. 260....xvi. 676.  
*Benner v. Porter*, 9 H. 235....xviii. 121.  
*Forsyth v. United States*, 9 H. 571....xviii. 266.  
*McNulty v. Batty*, 10 H. 72....xviii. 300.  
*Carter v. Bennett*, 15 H. 354....xx. 558.
- 1847, February 23, Judiciary, (Florida.) 9 Stats. at Large, 131.  
*Benner v. Porter*, 9 H. 235....xviii. 121.
- 1847, March 3, Admission of Wisconsin into the Union. 9 Stats. at Large, 178.  
*McNulty v. Batty*, 10 H. 72....xviii. 300.  
*Miners' Bank v. Iowa*, 12 H. 1....xix. 1.
- 1848, February 22, Appellate Jurisdiction, Supreme Court of the United States.  
 9 Stats. at Large, 211.  
*Sheppard v. Wilson*, 5 H. 210....xvi. 362, n.  
*Sheppard v. Wilson*, 6 H. 260....xvi. 676.  
 s. 2, p. 212. *McNulty v. Batty*, 10 H. 72....xviii. 300.
- 1848, May 29, Admission of Wisconsin into the Union. 9 Stats. at Large, 233.  
*Preston v. Bracken*, 10 H. 81....xviii. 304.  
 ss. 1, 2, 4, 6, pp. 233, 234. *McNulty v. Batty*, 10 H. 72....xviii. 300.
- 1848, August 12, Extradition Treaties. 9 Stats. at Large, 302.  
*In re Kaine*, 14 H. 103....xx. 63.
- 1848, August 14, Government of Oregon. 9 Stats. at Large, 323.  
 s. 9, p. 326. *United States v. Guthrie*, 17 H. 284....xxi. 506.
- 1849, March 3, Treaty with Mexico. 9 Stats. at Large, 393.  
*Wylie v. Coxe*, 15 H. 415....xx. 580.  
*Booth v. Clark*, 17 H. 322....xxi. 524.  
*Judson v. Corcoran*, 17 H. 612..., .xxi. 727.
- 1849, March 3, Revenue, (California.) 9 Stats. at Large, 400.  
*Cross v. Harrison*, 16 H. 164....xxi. 66.
- 1849, March 3, Government of Minnesota. 9 Stats. at Large, 403.  
 s. 9, p. 406. *United States v. Guthrie*, 17 H. 284....xxi. 506



1849, March 3, Relief of Peter Capella, &c. 9 Stats. at Large, 768.

United States *v.* Ferreira, 13 H. 40 . . . .xix. 378.

1850, March 29, Convention with Brazil. 9 Stats. at Large, 422.

Lewis *v.* Bell, 17 H. 616 . . . .xxi. 731.

1850, July 29, Conveyances of Vessels, &c. 9 Stats. at Large, 440.

Hays *v.* Pacific Mail Steamship Co. 17 H. 596 . . . .xxi. 713.

1850, September 9, Government of New Mexico. 9 Stats. at Large, 446.

s. 10, p. 449. United States *v.* Guthrie, 17 H. 284 . . . .xxi. 506.

1850, September 9, Government of Utah. 9 Stats. at Large, 453.

United States *v.* Guthrie, 17 H. 284 . . . .xxi. 506.

1850, September 18, Fugitives, &c. 9 Stats. at Large, 462.

United States *v.* Dawson, 15 H. 467 . . . .xx. 598.

s. 7, p. 464. Norris *v.* Crocker, 13 H. 429 . . . .xix. 575.

1851, March 3, Division of Arkansas into two Judicial Districts. 9 Stats. at Large, 594.

s. 2, p. 594. United States *v.* Dawson, 15 H. 467 . . . .xx. 598.

1851, March 3, Appropriations. 9 Stats. at Large, 598.

p. 606, Convention with Brazil.

Lewis *v.* Bell, 17 H. 616 . . . .xxi. 731.

1851, March 3, Appraisement of Merchandise. 9 Stats. at Large, 629.

s. 1, p. 629. Greely *v.* Thompson, 10 H. 225 . . . .xviii. 377.

1851, March 3, California Land Claims. 9 Stats. at Large, 631.

ss. 8, 9, 10, 12, pp. 632, 633. United States *v.* Ritchie, 17 H. 525 . . . .xxi. 656.

ss. 8, 11, pp. 632, 633. Fremont *v.* United States, 17 H. 542 . . . .xxi. 667.

1852, July 3, Convention with Brazil. 10 Stats. at Large, 11.

Lewis *v.* Bell, 17 H. 616 . . . .xxi. 731.

1852, August 26, Public Printing. 10 Stats. at Large, 30.

United States *v.* Seaman, 17 H. 225 . . . .xxi. 470.

1852, August 30, Security of Passengers in Steamers. 10 Stats. at Large, 61.

Steamboat New World *v.* King, 16 H. 469 . . . .xxi. 260.

1852, August 31, Appropriations. 10 Stats. at Large, 76.

s. 12, p. 99. United States *v.* Ritchie, 17 H. 525 . . . .xxi. 656.

1853, February 26, Frauds on Treasury. 10 Stats. at Large, 170.

Marshall *v.* Baltimore and Ohio Railroad Co. 16 H. 314 . . . .xxi. 153.

1853, March 2, Government of Washington Territory. 10 Stats. at Large, 172.

s. 9, p. 175. United States *v.* Guthrie, 17 H. 284 . . . .xxi. 506.

1853, March 3, Survey of Lands in California. 10 Stats. at Large, 244.

Fremont *v.* United States, 17 H. 542 . . . .xxi. 667.

1854, March 1, Preëmption, (California.) 10 Stats. at Large, 268.

Fremont *v.* United States, 17 H. 542 . . . .xxi. 667.

1854, May 30, Government of Nebraska and Kansas. 10 Stats. at Large, 277

s. 9, p. 280. United States *v.* Guthrie, 17 H. 284 . . . .xxi. 506.

## STEAMBOATS.

## BAILMENT, B. 2.

The act of July 7, 1838, (5 Stats. at Large, 804,) providing for the better security of the lives of passengers, is obligatory upon the owners and masters of steamers navigating the waters of the River Mississippi ninety-five miles above New Orleans. *Waring v. Clark*, 5 H. 441. . . .xvi. 456.

## STOCK.

## CORPORATION, G.

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## SALE, D.

## SUBSTITUTION.

## A. WHEN AND ON WHAT TERMS ALLOWED, 557.

## B. WHEN NOT ALLOWED, 557.

## A. WHEN AND ON WHAT TERMS ALLOWED.

1. A surety who pays a debt to the United States, is subrogated to the right of priority of payment which belonged to the United States. *Hunter v. United States*, 5 P. 173. . . .ix. 271.

2. By the statute of Maryland of 1763, c. 23, § 8, which is perhaps only declaratory of the common law, an indorser has a right to pay the amount of the note or bill to the holder, and obtain an assignment of the holder's judgment against the maker. *Lenox v. Prout*, 3 W. 520. . . .iv. 277.

3. If three persons mortgage their joint property to indemnify the drawer of bills of exchange drawn for their accommodation, in case of protest; and if each of the mortgagors agrees to take up a third part of the bills upon their return under protest; and if two of them neglect to take up their two thirds, whereby the other mortgagor is compelled to take up the whole of the bills, in consequence of which he requests the drawer not to release the mortgage but to hold it for his benefit, a lien in equity is thereby created upon the mortgaged property to the amount of two thirds of the bills in favor of that mortgagor who took up the whole. *Pratt v. Law*, 9 C. 456. . . .iii. 428.

## B. WHEN NOT ALLOWED.

1. Where a trust was created to pay to W. the amount that shall be recovered

and paid from him to N. upon account of a letter of credit, and N. had recovered a judgment at law against W. which was unsatisfied, W. being insolvent, it was held that N. could not, by a bill against the trustee and W., reach the trust fund. *Russell v. Clark's Executors*, 7 C. 69 . . . ii. 459.

2. But if the money is to be paid at all events, the person who is ultimately to receive it, under a trust, may sustain such a bill. *Id.*

3. Though, in general, a junior incumbrancer who pays off a prior incumbrance has a right to be substituted in place of the first incumbrancer, yet this right may be controlled by an agreement of the junior incumbrancer that the property shall be otherwise appropriated. *Bank of the United States v. Peter* 13 P. 123 . . . xiii. 82.

## SUITS AT COMMON LAW.

"Suits at the common law," within the meaning of the 7th amendment of the constitution, include, not merely modes of proceeding known to the common law, but all suits, not of equity or admiralty jurisdiction, in which legal rights are settled and determined. *Parsons v. Bedford*, 3 P. 433 . . . viii. 474.

## SUMMONS AND SEVERANCE.

ERROR, D.

## SUPERSEDEAS.

APPEAL, C.; ERROR, C.; EXECUTION, E.; PRACTICE, I. F.

1. An appeal claimed and allowed, and an appeal bond given, in an action at law, do not operate as a *supersedeas*; a writ of error sued out after the expiration of ten days from the judgment day, cannot so operate; and no court of the United States has any equitable power to correct the mistake and set aside an execution in such a case. *Saltmarsh v. Tuthill*, 12 H. 387 . . . xix. 200.

2. If the defendant, who is sued in a representative capacity, is removed from his trust on the day when a decree is rendered, execution cannot lawfully issue from a circuit court, in a case open to appeal. *Taylor v. Savage*, 1 H. 282 . . . xiv. 610.

3. Under the 14th section of the judiciary act of 1789, this court has power to issue a *supersedeas* to an execution of the circuit court, issued on a judgment which the defendant is seeking to reverse by a writ of error in this court; and the power will be exerted, where, without fault on his part, the defendant has lost the benefit of the *supersedeas* in the circuit court, by the case having been docketed and dismissed here, and another writ of error has been sued out. *Hardeman v. Anderson*, 4 H. 640 . . . xvi. 223.

4. The circuit court may quash a writ of *supersedeas* granted upon an appeal, if it becomes satisfied that sufficient security was not taken, and this court cannot review its proceeding, or issue a new writ of *supersedeas*, upon an inquiry and finding that the security was sufficient. *Black v. Zacharie*, 3 H. 483 . . . .xv. 527.

## SURETY.

BOND, C.; EVIDENCE, F.; GUARANTEE; JUDGMENTS, &c. B. 3; RECEIVERS AND DISBURSERS OF PUBLIC MONEY, C.; SUBSTITUTION.

1. Though the United States have, in the treasury, money belonging to a surety, they may agree to hold it, without a final appropriation to the payment of the debt, and bring an action against the principal for the benefit of the surety; this is in accordance with the 65th section of the collection act of 1799. (1 Stats. at Large, 676.) *Meredith v. United States*, 13 P. 486. . . .xiii. 260.

2. Voluntary forbearance toward the principal debtor, which the creditor is at liberty, at any time, to terminate, will not discharge a surety. *Creath's Administrator v. Sims*, 5 H. 192. . . .xvi. 353.

3. Where a note was made by one partner and third persons payable to himself and his copartner, in an action by the latter against the third persons, it was held that, if they were sureties, the plaintiff would not be permitted to prove that the name of the copartner was inserted by mistake, as this would vary the contract of the sureties. *McMicken v. Webb*, 6 H. 292. . . .xvi. 689.

4. In Louisiana, the sureties on a bond may be sued without their principal. *United States v. Hodge*, 6 H. 279. . . .xvi. 681.

ASSUMPSIT, C. 5; BOND, F. 3; ESTOPPEL, A. 6; JUDGMENTS, &c. E. 9.

## SURVIVORSHIP.

EQUITY, B. c.; POWERS, A.; PRACTICE, I. A. 3, II. B.

1. The cause of an action on the case against a marshal for false or insufficient returns of one of his deputies, does not survive, and consequently such action will not lie against the executor of the marshal, under the laws of North Carolina. *United States v. Daniel*, 6 H. 11. . . .xvi. 583.

2. Under the laws of Virginia, an action on the case for a false representation as to the credit of another, does not survive against the defendant's executor. *Henshaw v. Miller*, 17 H. 212. . . .xxi. 463.

## TAXES.

## CONSTITUTIONAL LAW, A. I.

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B. SALES FOR TAXES, AND THE TITLE ACQUIRED, 561.

C. REDEMPTION AND OTHER PROCEEDINGS, 562.

A. THE ASSESSMENT AND LEVY OF TAXES, AND WHEN VALID OR INVALID.

1. By the law of Michigan, lands, for which patent certificates had issued, were liable to taxation, at their full value, as the property of the purchaser, though no patent had been issued; and such a law is valid under the constitution and laws of the United States. *Carroll v. Safford*, 3 H. 441....xv. 509.

2. The charter of the Baltimore and Port Deposit Railroad Corporation, taken in connection with the acts of assembly of Maryland, Delaware, and Pennsylvania, which united that and two other companies into one corporation, did not exempt from taxation the property which belonged to the first-mentioned corporation. *Philadelphia and Wilmington Railroad Company v. Maryland*, 10 H. 376....xviii. 425.

3. In 1804, lands set apart by congress for a university in Ohio, were vested by the State in a corporation, with power to lease the lands at certain rents, and to increase the rents from time to time to the amount of any taxes imposed on similar property, and declaring that the lands should forever be exempt from all state taxes. In 1826, the corporation was authorized to sell the lands. *Held*, that the lands in the hands of purchasers were not exempt from taxation by the State. *Armstrong v. Treasurer of Athens County*, 16 P. 281....xiv. 299.

4. A State cannot tax an officer of the United States, for his office, or its emoluments. *Dobbins v. Commissioners of Erie County*, 16 P. 435....xiv. 370.

5. An ocean steamer owned and registered in New York, and regularly plying between Panama and San Francisco, and ports in Oregon, remaining in San Francisco no longer than is necessary to land and receive passengers and cargo, and in Benicia only for repairs and supplies, is not subject to taxation by the State of California. *Hays v. Pacific Mail Steamship Company*, 17 H. 596....xxi. 713.

6. The corporation of Alexandria has power to tax the lands of non-residents lying within the corporate limits. *Alexander v. Mayor and Commonalty of Alexandria*, 5 C. 1....ii. 172.

7. The power is not confined to half-acre lots. *Ib.*

8. But the tax cannot be recovered by motion, if the non-resident owner has other property within the town. *Ib.*

9. A purchaser of real estate in the city of Alexandria, is not liable for taxes assessed thereon before he became owner thereof. *Common Council of Alexandria v. Preston*, 8 C. 53....iii. 22.

10. The official tax-book, certified by the register, is competent evidence of the assessment of the tax. *Ronkendorf v. Taylor's Lessee*, 4 P. 349....ix. 98.

CONSTITUTIONAL LAW, A. 8-10, J. 28-30, N. 10, 11.

## B. SALES FOR TAXES, AND THE TITLE ACQUIRED.

1. Under the 8th section of the act of 1812, (2 Stats. at Large, 727,) to amend the act for the incorporation of the city of Washington, a sale of unimproved squares or lots in the city, for the payment of taxes, is illegal, unless such squares and lots have been assessed to the true and lawful proprietors thereof. *City of Washington v. Pratt*, 8 W. 681....v. 538.

2. The lien upon each lot, for the taxes, is several and distinct, and the purchaser of each holds his lot unincumbered with the taxes due on the other lots held by his vendor. *Ib.*

3. The advertisement must contain a particular statement of the amount of taxes due on each lot separately. *Ib.*

4. If the sale of one or more lots produce the amount of taxes actually due on the whole by the same proprietor, the corporation cannot proceed to sell further. *Ib.*

5. Notwithstanding the act of May 26, 1825, (4 Stats. at Large, 75,) where several lots belonging to the same person, are put up for sale for non-payment of taxes, the corporation of Washington can sell only so many lots as may bring enough to pay the entire taxes on all the lots; a sale of each lot for the tax due thereon is illegal. *Mason v. Fearson*, 9 H. 248....xviii. 130.

6. Under the tax act of July 14, 1798, (1 Stats. at Large, 597,) the collector could sell the land of a non-resident under the 13th section, only by complying with the directions contained in the 11th section. *Parker v. Rule's Lessee*, 9 C. 64....iii. 265.

7. The execution by a public officer of a power to sell lands for the non-payment of taxes, must be in strict pursuance of the law under which it is made, or no title is conveyed. *Thatcher v. Powell*, 6 W. 119....v. 30.

8. It is essential to the validity of the sale of lands for taxes, under the laws of Tennessee, that it should appear on the record of the court, by which the order of sale is made, that the sheriff had returned that there were no goods and chattels of the delinquent proprietor out of which the taxes could be made. *Ib.*

9. The publications which are required by law to be made, subsequent to the sheriff's return, and previous to the order of sale, are indispensable preliminaries to a valid order of sale. *Ib.*

10. In the case of lands sold for the non-payment of taxes, under the act of July 14, 1798, (1 Stats. at Large, 597,) the marshal's deed is not *prima facie* evidence that the prerequisites required by law have been complied with; but the party claiming under it must show positively that they have been complied with. *Williams v. Peyton's Lessee*, 4 W. 77....iv. 349.

11. Under the laws of Tennessee, where lands are sold by a summary proceeding for the payment of taxes, it is essential to the validity of the sale, and of the deed made thereon, that every fact necessary to give the court jurisdiction should appear upon the record. *M'Olung v. Ross*, 5 W. 116....iv. 582.

12. A tax collector, in selling land, must conform to the law from which his power is derived, otherwise he makes no title. *Stead's Executors v. Course*, 4 C. 403....ii. 152.

13. If authorized to sell only enough to pay the tax, and he sells an entire tract, when a small part would have been sufficient, the sale is void. *Ib.*

14. A tax sale in Ohio, is not admissible evidence of title, unless accompanied by proof that all the substantial requisites of the law have been complied with: and it is not sufficient that the auditor certifies they have been complied with; the court must see the proceedings, or duly authenticated copies of them. *Games v. Stiles*, 14 P. 322....xiii. 479.

15. Where a tax was assessed on a whole fractional quarter section, embracing several village lots, and the sale for its non-payment was of an "acre off the east side," the sale was held void. *Ballance v. Forsyth*, 13 H. 18....xix. 362.

16. A sale for taxes is void under the law of Ohio, if the land is listed and advertised only as five acres, in section 24, not specifying in what part, &c. of section 24 the five acres lie. *Raymond's Lessee v. Longworth*, 14 H. 76....xx. 46.

17. Under the act of May 26, 1824, § 2, (4 Stats. at Large, 75,) notice of a tax sale "once in each week for twelve successive weeks," is not given, unless the first notice preceded the sale eighty-four days. *Early v. Doe*, 16 H. 610....xxi. 317.

18. A requirement or notice by advertising, once a week, in some newspaper, &c. for three months, is complied with, if the first publication was December 6, and the last March 10, and one publication was made in each week, reckoning a week as a definite period of time, commencing with Sunday and ending with Saturday, though more than seven days intervened between two of the publications. *Ronkendorf v. Taylor's Lessee*, 4 P. 349....ix. 93.

19. A part of a lot may be sold for taxes; but if it be an undivided part, it must be so described in the published notice. *Ib.*

20. The whole period allowed for the payment of a tax should expire before a sale is advertised. *Ib.*

21. A notice, that land is to be sold "for taxes due thereon up to the year 1821," is sufficient. *Ib.*

#### DEED, B. 4.

#### C. REDEMPTION AND OTHER PROCEEDINGS.

1. The act of assembly of Pennsylvania, passed March 15, 1815, authorizing the redemption of lands sold for taxes, should be benignly construed, and any person may redeem who has any right in the land or any title to its possession which can be deemed an estate therein. *Dubois v. Hepburn*, 10 P. 1....xii. 1.



2. An offer to pay the tax, and a refusal by the treasurer to receive the money, without a technical tender, will enable the one entitled to redeem to bring a suit for the land. *Ib.*

## TENDER.

It requires an express stipulation to entitle a party, making a tender, to demand a release before he delivers what is tendered. *Hepburn v. Auld*, 1 C. 321....i. 419.

PAYMENT, A. 7.

## TERRITORIES OF THE UNITED STATES.

### CONSTITUTIONAL LAW, A.

1. Though by the fundamental law of a territory its legislation is to be subject to the disapproval of congress, yet till disapproved it is valid and operative; it does not owe its effect to the action of congress thereon, so as to become an act of congress. *Miners' Bank of Dubuque v. Iowa*, 12 H. 1....xix. 1.

2. A court erected by the territorial legislature of Florida to try and determine cases of salvage, is in conformity with the constitution and laws of the United States. *American Ins. Co. v. Three Hundred and Fifty-six Bales of Cotton*, 1 P. 511....vii. 685.

3. A case in admiralty is not "a case arising under the constitution and laws of the United States," within the meaning of the 8th section of the act of March 3, 1823, (3 Stats. at Large, 752,) to amend the act organizing the Territory of Florida. *Ib.*

4. Whether the power of congress to govern the territories is derived from the right of the United States to acquire territory, or from that clause in the constitution which empowers congress "to make all needful rules and regulations concerning the territory and other property of the United States," the possession of the power is unquestioned. *Ib.*

## TEXAS.

### NAVY OF THE UNITED STATES.

The laws of the United States were extended over, and began to operate in Texas, December 29, 1845, (9 Stats. at Large, 1, 108,) and a seizure of goods, under the revenue laws of Texas, after that day, was invalid. *Calkin v. Cocks*, 14 H. 227....xx. 151.

## TIME.

GIVING TIME; LIMITATIONS, G.; REASONABLE TIME, &c.; VENDOR AND PURCHASER, C. 22.

## TRADING WITH OR UNDER LICENSE OF ENEMIES.

## CAPTURE, F.

1. The plaintiff, in the train of one of the military expeditions from the United States, entered Mexico during the war with that country, for purposes of trade; after entering that country, his wagons and teams were taken possession of by the defendant, the second in command, under an order from the commanding officer of the expedition, and, in consequence, his goods were lost, and his teams and wagons destroyed. *Held*, 1. That as he entered the country to trade with the enemy by the permission of the commander, and under the sanction of the executive power of the United States, his property was not liable to seizure by law for such trading. *Mitchell v. Harmony*, 13 H. 115 . . . . xix. 420.

2. That mere rumors or suspicions of a design to quit the forces and join himself to the enemy, would not justify the seizure; the defendant must prove the fact that such illegal design existed. *Ib.*

3. That to justify the seizure, in order to prevent the property from falling into the hands of the enemy, or to appropriate it to the public defence, the danger must be immediate and instantly impending; and though the state of facts, as they appeared to the commander when he acted, must govern, and he is justified in acting on reasonable grounds of belief; yet, mere good intentions on his part, and a general desire to promote the public service, are not sufficient; his judgment must have been fairly exercised upon the case of necessity shown by the evidence before him, to take private property for the use of the expedition, or to prevent the enemy from using it. *Ib.*

4. After the plaintiff's property had been seized and taken out of his control, and carried to a distant place, whither he necessarily followed, his efforts to save it from loss, and offers to restore the possession to him, did not divest his right of action, or impose on him any duty of taking possession. *Ib.*

5. The sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitute such an act of illegality as subjects the ship and cargo to confiscation as prize of war. *The Julia*, 8 C. 181 . . . . iii. 81; *The Hiram*, 8 C. 444 . . . . iii. 213.

6. The decision in the case of *The Julia*, (8 C. 181,) affirmed, and its principle applied to a case where it was not expressly stated in the license that its object was to supply the enemy with provisions, but where such object was plainly inferable. *The Hiram*, 8 C. 444 . . . . iii. 213.

7. The acceptance and use of an enemy's license on a voyage to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation. *The Aurora*, 8 C. 203 . . . . iii. 95.

8. It is not necessary, in order to subject the property to condemnation, that the person granting the license should be duly authorized to grant it, provided

the person receiving it takes it with the expectation that it will protect his property from the enemy. *Ib.*

9. Sailing, with an intention to further the views of the enemy, is sufficient to condemn the property, although that intention be frustrated by capture. *Ib.*

10. No lien upon enemy's property, by way of pledge for the payment of purchase-money, or otherwise, is sufficient to defeat the rights of the captors, in a prize court, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. *The Frances*, 8 C. 418....iii. 200.

11. Trading with an enemy does not *ipso facto* forfeit the property so obtained by a citizen, but only subjects it to condemnation when regularly captured. *The Thomas Gibbons*, 8 C. 421....iii. 202; *The Mary*, 9 C. 126....iii. 292.

12. Property engaged in an illicit intercourse with the enemy, to be condemned to the captors, not to the United States. *The Sally*, 8 C. 382....iii. 182.

13. After a declaration of war, an American citizen cannot lawfully send a vessel to the enemy's country to bring away his property. *The Rapid*, 8 C. 155....iii. 78.

14. Intercourse and not merely trading is forbidden. *Ib.*

15. If, upon the breaking out of a war with this country, our citizens have a right to withdraw their property from the enemy's country, it must be done within a reasonable time. *The St. Lawrence*, 9 C. 120....iii. 288.

16. Eleven months after the declaration of war is too late. *Ib.*

17. A vessel of the United States, which went to England after the war was known, and brought thence a cargo belonging chiefly to British subjects, condemned. *The St. Lawrence*, 8 C. 434....iii. 210.

18. A vessel of the United States, which carries a cargo or freight from a neutral to an enemy's port, after the war was known, is liable to capture and condemnation, though such passage is a part of her home voyage from the neutral port to the United States, and the capture is made after she has sailed from the enemy's port. *The Joseph*, 8 C. 451....iii. 217.

19. Navigating under a license from the enemy is cause of confiscation, and is closely connected in principle with the offence of trading with the enemy: in both cases, the knowledge of the agent will affect the principal, although he may, in reality, be ignorant of the fact. *The Hiram*, 1 W. 440....iii. 627.

20. A vessel, owned by citizens of the United States, sails from Naples, in the year 1812, for the United States, with a cargo and a British license to carry the same to England. On her passage, hearing that war had broken out between Great Britain and the United States, she alters her course for England; is captured by the British, carried into Ireland, libelled, and acquitted upon her license; sells her cargo, and, after a detention of seven months in Ireland, purchases a return cargo in Liverpool, sails for the United States, and is captured by a United States' privateer. Vessel and cargo condemned as prize to the captors. *The Alexander*, 8 C. 169....iii. 78.

21. One citizen of the United States has no right to purchase of, or sell to, another, a license or pass from the public enemy, to be used on board an American vessel. *Patton v. Nicholson*, 3 W. 204....iv. 199.

22. The sailing under the enemy's license constitutes, of itself, an act of illegality, which subjects the property to confiscation, without regard to the object of the voyage or the port of destination. *The Ariadne*, 2 W. 143.... iv. 62.

23. A question of fact upon a seizure in port, as a droit of admiralty, for trading with the enemy, and using his license. The circumstance of the vessel having been sent into an enemy's port, for adjudication, and afterwards permitted to resume her voyage, held to raise a violent presumption that she had a license, which the claimant not having repelled by explanatory evidence, condemnation was pronounced. *The Langdon Cheves*, 4 W. 103.... iv. 358.

24. Under the act of the 6th of July, 1812, (2 Stats. at Large, 778,) "to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes," held, that living fat oxen, &c., are articles of provision and munitions of war, within the true intent and meaning of the act. *United States v. Sheldon*, 2 W. 119.... iv. 53.

25. Also held, that driving living fat oxen, &c., on foot, is not a transportation thereof within the true intent and meaning of the same act. *Ib.*

26. Fat cattle are provisions, or munitions of war, within the meaning of the act of congress, of the 6th of July, 1812, (2 Stats. at Large, 778,) to prohibit a citizen of the United States from proceeding to or trading with the enemies of the United States, and for other purposes. *United States v. Barber*, 9 C. 243.... iii. 349.

27. A vessel and cargo, which is liable to capture as enemy's property, or for sailing under the pass or license of the enemy, or for trading with the enemy, may be seized after her arrival in a port of the United States, and condemned as prize of war. The *delictum* is not purged by the termination of the voyage. *The Caledonian*, 4 W. 100.... iv. 356.

CONTRACT, C. 8.

## TREASON.

### BAIL, A.

1. To constitute treason war must be actually levied. *Ex parte Bollman*; *Ex parte Swartwout*, 4 C. 75.... ii. 23.

2. A conspiracy to subvert the government by force, is not treason. *Ib.*

3. If a body of men be actually assembled for the purpose of effecting by force a treasonable design, all who perform any part, however minute, and however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors. *Ib.*

4. The mere enlistment of men, who are not assembled, is not a levying of war. *Ib.*

## TREASURY.

### SECRETARY OF THE TREASURY.

## TREASURY TRANSCRIPTS, AND WARRANTS.

RECEIVERS AND DISBURSERS OF PUBLIC MONEY.

## TREATIES.

CONSTITUTIONAL LAW, C. 1; INDIANS, C. 2.

## A. CONSTRUCTION OF PARTICULAR TREATIES, 567.

1. FRANCE, 1778, 1800, 1803.
2. GREAT BRITAIN, 1783, 1794.
3. SPAIN, 1795, 1819.
4. FRANCE AND SPAIN, 1762, 1800.
5. PORTUGAL, 1840.

## B. RULES OF CONSTRUCTION, 571.

## C. SUSPENSION AND TERMINATION, 571.

## D. COMMISSIONERS UNDER AND THEIR POWERS, AND THE EFFECT OF THEIR ACTION, 571.

## A. CONSTRUCTION OF PARTICULAR TREATIES.

## 1. FRANCE, 1778, 1800, 1803.

1. Under the nineteenth article of the treaty with France, a privateer has a right to make repairs in our ports. *Moodie v. Ship Phæbe Anne*, 3 D. 319 ....i. 237.

2. The replacement of her force is not an augmentation of it. *Ib.*

3. The treaty of amity and commerce between the United States and France, of 1778, art. 11, enabled the subjects of France to purchase and hold lands in the United States. *Chirac v. Chirac's Lessee*, 2 W. 259.... iv. 97.

4. The convention of 1800, between the United States and France, enabling the people of one country holding lands in the other, to dispose of the same by testament, or otherwise, and to inherit lands in the respective countries without being obliged to obtain letters of naturalization, rendered the performance of the condition required by the law of Maryland, to sell to a citizen within ten years, a useless formality, and the conventional rule applied equally to the case of those who took by descent, under the act, as to those who acquired by purchase, without its aid. *Ib.*

5. The further stipulation in the convention, "that in case the laws of either of the two States should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be," was held not to affect the rights of a French subject, who takes or holds by the

convention, so as to deprive him of the power of selling to citizens of this country ; and was held to give to a French subject, who had acquired lands by descent, or devise, (and, perhaps, in any other manner,) the right, during life, to sell, or otherwise dispose thereof, if lying in a State where lands purchased by an alien would be immediately escheatable. *Ib.*

6. Although the convention of 1800 has expired by its own limitation, yet the instant the descent was cast on a French subject during its continuance, his rights became complete under it, and could not be affected by its subsequent expiration. *Ib.*

7. The treaty of Paris, ceding Louisiana to the United States, took effect on the day of its date, April 30, 1803 ; its subsequent ratification and the formal transfer of possession have relation to that date. *United States v. Reynes*, 9 H. 127 . . . . xviii. 65.

8. The stipulation in the treaty of Paris to protect the inhabitants of Louisiana, in the enjoyment of their "property," can have no application to a grant of land made by the Spanish authorities after Spain had ceased to have power rightfully to make such a grant. *Ib.*

9. Points concerning the effect of treaties settled by previous decisions, stated and applied to this case. *United States v. D'Auterive*, 10 H. 609 . . . . xviii. 516.

10. The stipulation in the treaty of cession of Louisiana, for protection of the inhabitants in their property, &c. ceased to operate when that State was admitted into the Union. *City of New Orleans v. Armas*, 9 P. 223 . . . . xi. 388.

## 2. GREAT BRITAIN, 1783, 1794.

1. The 6th article of the treaty of peace, of 1783, protected from forfeiture, by reason of alienage, lands then held by British subjects. *Orr v. Hodgson*, 4 P. 453 . . . . iv. 442.

2. The 9th article of the treaty of 1794, under the word heirs, did not include any other than British subjects, or American citizens, at the time of the descent cast. *Ib.*

3. Under the 9th article of the treaty of 1794, between the United States and Great Britain, by which it is provided that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the remedies incident thereto, should not be considered as aliens ; the parties must show that the title to the land for which the suit was commenced, was in them, or their ancestors, at the time the treaty was made. *Harden v. Fisher*, 1 W. 300 . . . . iii. 560.

4. The treaty of peace, saved liens upon lands for debts. *Higginson v. Mein*, 4 C. 415 . . . . ii. 155.

5. The "interest in lands by debts," intended to be protected by the 5th article of the treaty of peace with Great Britain, must be an interest held as security for money at the time of the treaty. *Owings v. Norwood's Lessee*, 5 C. 344 . . . . ii. 288.

6. The 4th article of the definitive treaty of peace, between the United States and Great Britain, concluded on the 3d of September, 1783, enables British

creditors to recover debts, previously contracted to them by our citizens, notwithstanding a payment of the debt into a state treasury had been made during the war, under the authority of a state law of sequestration. *Ware v. Hylton*, 8 D. 199....i. 164.

ALIEN, A. 4; C. 2-5; CONFLICT OF LAWS, K. 8, 9; LAW OF NATIONS, E. 18-21; PUBLIC LANDS OF STATES, A. 12.

### 8. SPAIN, 1795, 1819.

#### PUBLIC LANDS OF THE UNITED STATES, III. D. d. 5.

1. The 6th and 14th articles of our treaty with Spain of the 27th of October, 1795, (8 Stats. at Large, 142, 144,) prohibit a citizen of the United States from taking a commission to cruise against Spanish vessels and property in a privateer, but not in a public armed vessel of a belligerent nation. *The Santissima Trinidad and The St. Ander*, 7 W. 283....v. 268.

2. Under the Spanish treaty of 1795, stipulating that free ships shall make free goods, the want of such a sea-letter or passport, or such certificates as are described in the 17th article, is not a substantive ground of condemnation. It only authorizes capture and sending in for adjudication, and the proprietary interest in the ship may be proved by other equivalent testimony. *The Pizarro*, 2 W. 227....iv. 91.

3. The term "subjects," in the 15th article, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens" or "inhabitants" when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the Spanish dominions. *Ib.*

4. The Spanish character of the ship being ascertained, the proprietary interest of the cargo cannot be inquired into, unless so far as to ascertain that it does not belong to citizens of the United States, whose property, engaged in trade with the enemy, is not protected by the treaty. *Ib.*

5. The 17th article of the Spanish treaty of 1795, (8 Stats. at Large, 148,) so far as it purports to give any effect to passports, is imperfect and inoperative, in consequence of the omission to annex the form of passport to the treaty. *The Amiable Isabella*, 6 W. 1....v. 1.

6. By the Spanish treaty of 1795, free ships make free goods; but the form of the passport, by which the freedom of the ship was to have been conclusively established, never having been annexed to the treaty, the proprietary interest of the ship is to be proved according to the ordinary rules of the prize court, and if thus shown to be Spanish, will protect the cargo on board, to whomsoever the latter may belong. *Ib.*

7. By the treaty of Fontainebleau, of the third day of November, 1762, the king of France ceded to the king of Spain the province of Louisiana, and a grant of land in that province made by the French authorities, after that date, was void. *United States v. D'Auterive*, 10 H. 609....xviii. 516.

8. Native Africans, unlawfully detained on board a Spanish vessel, are not bound by a treaty between the United States and Spain, but may, as foreigners to both countries, assert their rights to their liberty before our courts. *United States v. The Amistad*, 15 P. 518....xiv. 156.



9. Under the 9th article of the treaty of 1819, (8 Stats. at Large, 252,) between the United States and Spain, providing for the restoration of property rescued from pirates and robbers on the high seas, it is necessary to show, 1. That what is claimed falls within the description of vessel or merchandise. 2. That it has been rescued on the high seas from pirates and robbers. 3. That the asserted proprietors are the true proprietors, and have established their title by competent proof. *Ib.*

10. Negroes, lawfully held as slaves, and subject to sale, under the laws of Spain, on board a Spanish vessel, may be deemed merchandise; but native Africans, unlawfully kidnapped, and imported into a Spanish colony, contrary to the laws of Spain, are not merchandise, nor can any person show that he is entitled to them as their proprietor, nor are they pirates or robbers, if they rise and kill the master and take possession of the vessel to regain their liberty. *Ib.*

11. The treaty with Spain applies to only two cases, piracy and captures in violation of our neutrality, and this is neither of those cases. *The Nuestra Senora de la Caridad*, 4 W. 497....iv. 453.

12. The 8th article of the treaty between the United States and Spain, of January 24, 1818, (8 Stats. at Large, 252,) taken in connection with the 2d article, and with the explanatory declaration made by the king of Spain when he ratified the treaty, does not provide for grants made by the Spanish authorities between the rivers Iberville and Perdido. *Foster v. Neilson*, 2 P. 253....viii. 108.

13. The words "in possession of the lands," in the 8th article of the treaty, do not require actual occupancy; they are satisfied by that constructive possession which is attributed by the law to legal ownership. *United States v. Arredondo*, 6 P. 691....x. 315.

PUBLIC LANDS OF THE UNITED STATES, I. 7, III. D. a. 7, III. D. c. 4, 5.

#### 4. FRANCE AND SPAIN, 1762, 1800.

1. The treaty of San Ildefonso deprived Spain of the power to make grants of land in Louisiana, if not after its date, certainly after the 21st of March, 1801. *United States v. Reynes*, 9 H. 127....xviii. 65.

2. It is in accordance with the laws of nations, and has been affirmed by each department of this government, that the treaty of San Ildefonso took effect on the day of its date, October 1, 1800; so that the Spanish governor of Louisiana could make no valid grant of a franchise to keep a ferry after that day. *Davis v. Police Jury of Concordia*, 9 H. 280....xviii. 139.

*Supra*, A. 3.

#### 5. PORTUGAL, 1840.

The second article of the treaty with Portugal, of August 26, 1840, (8 Stats. at Large, 560,) did not restrict either party from laying discriminating duties on merchandise not the growth or production of the nation of the vessel carrying the same into the port of the other nation; and the provision in schedule I. of the tariff act of July 30, 1846, (9 Stats. at Large, 49,) exempting tea and cof-

fee from duty, when imported direct from the place of their growth or production, in American vessels or in foreign vessels entitled by reciprocating treaties to be exempt from discriminating duties, tonnage, and other charges, does not apply to such articles, when imported in Portuguese vessels. *Oldfield v. Marriott*, 10 H. 146....xviii. 328.

## B. RULES OF CONSTRUCTION.

1. A treaty between the United States and the Cherokee tribe of Indians concerning lands, is the contract of both parties, and its plain terms cannot be controlled by the acts of one of the agents of the United States. *Meigs v. McClung's Lessee*, 9 C. 11....iii. 234.

2. As respects performance of the conditions of a grant by a private grantee, the date of a treaty is the time of its final ratification. *United States v. Arredondo*, 6 P. 691....x. 315.

LAW OF NATIONS, C. 9-11; PUBLIC LANDS OF STATES, D. 3.

## C. SUSPENSION AND TERMINATION.

1. The termination of a treaty, by war, does not divest rights of property already vested under it. *Society for the Propagation of the Gospel, &c. v. New Haven*, 8 W. 464....v. 483.

2. Treaties, stipulating for a permanent arrangement of territorial and other national rights, are, at most, suspended during war, and revive at peace, unless they are waived by the parties, or new and repugnant stipulations are made. *Id.*

## D. COMMISSIONERS UNDER AND THEIR POWERS, AND THE EFFECT OF THEIR ACTION.

1. Under the treaty with Spain, of February 22, 1819, (8 Stats. at Large, 252,) the commissioners had power to decide conclusively upon the amount and validity of claims, but not upon the conflicting rights of parties to the sums awarded by them. *Comegys v. Vasse*, 1 P. 193....vii. 529.

2. Under the act of congress constituting a board of commissioners to pass on claims, provided for by the treaty between the United States and France, of July 4, 1831, (4 Stats. at Large, 574,) the decision of the board between conflicting claimants is not conclusive, and the question of their respective title is fully open to be adjudicated by the courts. *Frevall v. Bache*, 14 P. 95....xiii. 366.

3. Though the award of commissioners under the act of March 3, 1849, (9 Stats. at Large, 922,) passed to carry into effect the convention between the United States and Mexico, does not finally settle the equitable rights of third persons to the money awarded, yet it makes a legal title to the person recognized by the award as the owner of the claim; and if he also has equal equity, his legal title cannot be disturbed. *Judson v. Oorcoran*, 17 H. 612....xxi. 727.

## TRESPASS.

1. Where an execution was levied on slaves, and a delivery bond given in Mississippi, and on its forfeiture, which operated as a judgment against the principal and surety, the surety took the slaves by force out of the possession of the principal and subjected them to sale on the execution, and thus satisfied the judgment, in an action of trespass by the principal against the surety ; *held*, that the latter might recoup from the damages the amount of the judgment so satisfied. *McAfee v. Crofford*, 18 H. 447 . . . . xix. 583.

2. The jury having found that, in consequence of the wrongful abduction of the plaintiff's slaves, the cattle of the neighbors destroyed his corn, and a flood in the river swept away a quantity of his wood, *held*, that it was not erroneous to include the value of these things in the damages, in an action of trespass for carrying away the slaves. *Ib.*

PLEADING, B. 19 ; C. 12.

## TRIAL.

CRIMINAL PROCEDURE, C. ; JURY, A. B. ; PRACTICE, II. G.

## TRUSTS.

LIMITATIONS, F.

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## A. CREATION OF TRUSTS.

## 1. BY ACT OF PARTY.

1. To establish the existence of a trust, the *onus probandi* lies on the party who alleges it. *Prevost v. Gratz*, 6 W. 481 . . . . v. 131.

2. The terms "in trust" in a will, may be construed to raise a use, but this is not their ordinary meaning ; and, to divest them of their fiduciary character, the intention of the testator to do so must appear. *King v. Mitchell*, 8 P. 326 . . . . xi. 117.

3. Though a deed contain language which would be sufficient to raise a use,

executed, yet if it appear that the legal title was to continue in trustees, such language will be held only to declare a trust. *Neilson v. Lagow*, 12 H. 98.... xix. 46.

## 2. BY OPERATION OF LAW, AND HEREIN OF CONSTRUCTIVE TRUSTS FOR PURPOSES OF REMEDY.

1. Where lands are devised in trust merely, for objects incapable of taking, there is a resulting trust for the heirs at law. This rule applied to the particular provisions of a will. *King v. Mitchell*, 8 P. 326....xi. 117.

2. Generally, there is a resulting trust in favor of him who pays the consideration, but this is merely an implication, which may be rebutted by showing such was not the intention of the parties. *Jenkins v. Pye*, 12 P. 241....xii. 712.

3. The vendor may be considered as a trustee for whoever may become purchasers under a sale by order of the court for the benefit of the vendee. *Hepburn v. Dunlop*, 1 W. 179....iii. 509.

4. An agent, to locate a warrant, who takes a title to himself, of land which he should have had surveyed for his principal, becomes a trustee for his principal. *Massie v. Watts*, 6 C. 148....ii. 345.

5. Though *fidei commissa* are abolished in Louisiana, this does not prevent a court of the United States, administering equity there, from holding a wrongdoer, a trustee for the party justly entitled, by way of remedy for the wrong. *Gaines v. Chew*, 2 H. 619....xv. 236.

### AGENT, C. 1.

## B. THE NATURE, EFFECT, AND EXTENT OF PARTICULAR TRUSTS, AND HOW DETERMINED.

1. An executed marriage settlement must be expounded upon principles applicable to other deeds. *Adams v. Law*, 17 H. 417....xxi. 584.

2. The purpose of a marriage settlement being to provide a jointure, and not to make a settlement on the issue of the marriage, a limitation was made to the children of the marriage, contingent upon the event that the wife should depart this life in the lifetime of the husband, leaving issue of the said marriage one or more children then living; *held*, that the word issue, as explained by the subsequent words, did not include grandchildren. *Ib.*

3. The distinction between an executory agreement to create certain trusts *in futuro*, and an executed agreement or settlement which actually defines and creates them *in presenti*, recognized; but an ante-nuptial agreement, in this case, was held to create trusts, and that collateral kindred might have the aid of a court of equity to compel their performance, though no trustee was interposed between the husband and wife. *Neves v. Scott*, 9 H. 196....xviii. 98. 13 H. 268....xix. 492.

4. Under a direction in a marriage settlement to invest a fund, to raise a jointure for the intended wife, on freehold security in stock of the United States or bank stock, with her approbation, she had a right to elect between the

investments, and the trustees were bound to conform to her choice. *English v Foxall*, 2 P. 595 . . . .viii. 222.

5. If she acted from mere caprice, or with a design to impose a loss on the estate, a court of chancery might control her action. *Ib.*

DEBTOR AND CREDITOR, 3; DEED, E. 6, I. 2; PARTNERSHIP, C. 4, 5; POWERS, A. 14.

### C. TRUSTEES, AND HEREIN OF BREACHES OF TRUST.

#### ASSIGNMENTS FOR BENEFIT OF CREDITORS; FIDUCIARY CAPACITY.

1. Trustees to sell must unite in the sale and conveyance to pass any title to property held by them jointly. *Wilbur v. Almy*, 12 H. 180 . . . .xix. 89.

2. The option of the *cestui que trust* to follow the trust property into the hands of one not a *bond fide* purchaser, for value, without notice, or to take its proceeds, cannot be controlled by a repurchase by the trustee, who committed a breach of trust. *Ib.*

3. Where a creditor of a land company obtained a judgment at law against the company, in a State in which they did not reside, without notice, and levied on land there, in which the company had only an equitable interest, and the trustee of the company, who held the means of obtaining the legal title, gave those means to the creditor, without notice to the *cestuis que trust*; held, that a court of equity would not consider such a title valid. *Oliver v. Piatt*, 3 H. 333 . . . .xv. 479.

4. A trustee who has made usurious interest, must account for it to his *cestui que trust*. *Barney v. Saunders*, 16 H. 535 . . . .xxi. 288.

5. Trustees, under a duty to invest on good security, who suffer moneys to lie on deposit at a banker's, payable on demand with interest, longer than was needful to obtain a proper investment, must bear any loss arising from the failure of the banker. But not of sums recently deposited, as they deposited their own funds. *Ib.*

6. A purchase by an executor, though a third person, of property of the testator, is fraudulent and void, though the sale was at public auction, judicially ordered, and the result of the evidence is that a fair price was paid. *Michoud v. Girod*, 4 H. 503 . . . .xvi. 188.

7. This position is as well founded in the law of Louisiana as in that of England. *Ib.*

8. The civil law on the subject examined. *Ib.*

9. A trustee is liable for damages for neglect in not receiving more money from the sale of land, only in cases of wilful default, or very supine negligence. *Taylor v. Benham*, 5 H. 233 . . . .xvi. 377.

10. A trustee cannot purchase, or acquire by exchange, the trust property. *Wormley v. Wormley*, 8 W. 421 . . . .v. 469.

11. Where the trustee in a marriage settlement has a power to sell, and reinvest the trust property, whenever, in his opinion, the purchase-money may be laid out advantageously for the *cestui que trusts*, that opinion must be fairly and honestly exercised, and the sale will be void where he appears to have

been influenced by private and selfish interests, and the sale is for an inadequate price. *Ib.*

12. No particular form of notice of a sale under a deed of trust is prescribed by law; it is sufficient if the description of the land is reasonably certain so as to inform the public of the property to be sold. *Newman v. Jackson*, 12 W. 570....vii. 363.

13. Where property held in trust was limited to husband and wife for life, remainder to their children, with power to the tenants for life to consent to a sale and reinvestment in other property, and the trustee prevailed on the tenants for life to consent to a loan of money to him without security, this was a breach of trust. *Caldwell v. Taggart*, 4 P. 190....ix. 49.

## UNDUE INFLUENCE.

### FIDUCIARY CAPACITY; PARENT AND CHILD.

1. Though transactions between parents and children, by which the former acquire the lands of the latter, should be carefully scrutinized, there is no presumption that they are invalid. *Jenkins v. Pye*, 12 P. 241....xii. 712.

2. Courts of equity do not hold a conveyance made by a female child just of age, to her parents, to be void on its face; but they will scrutinize such a transaction with much jealousy, on account of the natural influence which parents have over children; and if it be found that there was the least unconscionable advantage taken of that influence, or that the act was unreasonable under the circumstances, they will set it aside. *Taylor v. Taylor*, 8 H. 183....xvii. 548.

3. A question of fact whether a bond and mortgage were obtained by the use of undue influence by a clergyman. *Jackson v. Ashton*, 11 P. 229....xii. 407.

4. A release from an heir at law to executors, made under a mistake of law and some undue influence, set aside, though a large but inadequate consideration was paid. *Wheeler v. Smith*, 9 H. 55....xviii. 33.

## UNITED STATES.

CONSTITUTIONAL LAW; PRIORITY OF PAYMENT OF THE UNITED STATES;  
RECEIVERS AND DISBURSERS OF PUBLIC MONEY; SET-OFF, A. B.

A. POWERS, LIABILITIES AND RIGHTS AS A BODY POLITIC, AND  
AS THE OWNER OF PROPERTY, 576.

B. PREROGATIVE RIGHTS ALLOWED OR DENIED, 577.

A. POWERS, LIABILITIES AND RIGHTS AS A BODY POLITIC, AND  
AS THE OWNER OF PROPERTY.

CONSTITUTIONAL LAW, D. 1.

1. In all cases of contract with the United States, they have the right to sue in their own name, unless a different mode of proceeding is required by law. *Dugan v. United States*, 3 W. 172....iv. 189.

2. The United States may sue on a bill of exchange indorsed to T., treasurer of the United States. *Ib.*

3. The presumption is that the bill was taken in the lawful discharge of the official duties of the treasurer. *Ib.*

4. If the United States, through their authorized officer, accept a bill of exchange, they are bound for its payment to a *bonâ fide* holder for value, whatever may have been the equities as between them and the drawer. *United States v. Bank of the Metropolis*, 15 P. 377....xiv. 114.

5. A bill was drawn by a contractor, on the postmaster-general, and having been "accepted on condition that the drawer's contracts be complied with," was discounted by the defendants. *Held*, that forfeitures previously incurred and advances previously made, were not within the condition. *Ib.*

6. Wherever the government of the United States, through its lawfully authorized agents becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the indorser, as in a transaction between private individuals. *United States v. Barker*, 12 W. 559....vii. 356.

7. The United States, being a body politic, with power to acquire and hold property, is entitled to the remedies provided by law for its protection, and among others to the action of trespass *quare clausum* for entering on their lands, and cutting their trees. *Cotton v. United States*, 11 H. 229....xviii. 607.

8. The capacity of the United States to contract, explained. *United States v. Bradley*, 10 P. 343....xii. 155.

9. The 7th section of the act of May 1, 1820, (3 Stats. at Large, 568,) does not prevent the acquisition of the legal title to land by the United States, when taken as security for a debt by the proper officer, though not specially required or authorized by any particular act of congress. *Neilson v. Lagow*, 12 H. 98....xix. 46.

10. Digging lead ore from the public lands is such waste as entitles the United States to an injunction. *United States v. Gear*, 3 H. 120....xv. 328.

11. The United States, being a drawer of a protested bill, is liable to pay damages. *Bank of the United States v. United States*, 2 H. 711....xv. 257.

12. Though an officer of the government had the power to retain moneys to pay a debt to the United States, his omission to do so does not release the debt, or prevent the United States from asserting a lien on those moneys in the hands of a third person. *Hunter v. United States*, 5 P. 173....ix. 271.

13. The United States may sue at law in their own name on a claim



assigned to them, especially if the assignment be authorized by an act of congress; but they have no better title than their assignor, and the statute of limitations is a good plea to such an action. *United States v. Buford*, 3 P. 12....viii. 266.

14. The streets and public squares of the City of Washington having been conveyed by the proprietors of the lands to trustees "for the use of the United States," *held*, that the United States own the lands in fee-simple, and, in connection with certain public improvements, might sell portions of the same, which were no longer useful as streets, &c., and make a title thereto; and that the original proprietors had no interest therein. *Van Ness v. The Mayor, &c. of the City of Washington*, 4 P. 282....ix. 62.

15. If the United States is defrauded out of a patent, it can, like any other proprietor, maintain a bill in equity to set it aside. *United States v. Hughes*, 1 H. 552....xviii. 711.

## B. PREROGATIVE RIGHTS ALLOWED OR DENIED.

### BOND, C. 3.

1. The statute of Maryland of 1785, in its terms, does not embrace a bill of exchange drawn on a foreign government. *United States v. Bank of the United States*, 5 H. 382....xvi. 429.

2. An instrument, though in the form of a bill of exchange, drawn by one government on another, is not governed by the law merchant, and therefore is not subject to protest and consequential damages. *Ib.*

3. A bill in equity to enjoin the United States, cannot be entertained. *Hill v. United States*, 9 H. 386....xviii. 189.

4. The United States cannot be sued by a bill in equity, to enjoin a judgment by reason of its having been paid. *United States v. M'LeMORE*, 4 H. 286:....xvi. 117.

5. But the circuit court in which the judgment was recovered, may, on motion, inquire into the fact of payment, and, if found, may quash the execution, and enter satisfaction on judgment. *Ib.*

6. The United States, being an execution creditor, is subject to the law regulating imprisonment for debt, which only regulates the mode of proceeding in suits, and does not divest the public of any right or violate any principle of public policy necessary for its protection. *United States v. Knight*, 14 P. 301....xiii. 470.

### COSTS, A. 8.

## USAGE.

### INSURANCE, K.

1. What evidence should be given of a usage affecting negotiable paper. *Bowling v. Harrison*, 6 H. 248....xvi. 672.

2. One witness cannot prove that a fact was notorious. *Watts v. Lindsey's Heirs*, 7 W. 158....v. 241.

3. Proof of four instances, during two years, in which a bank departed from

the law merchant as to the time of giving notice to an indorser, is not sufficient to establish a usage binding on an indorser. *Adams v. Otterback*, 15 H. 539 . . . .xx. 621.

4. Though the declaration contain no allegation of the custom, if the proof of it was admitted without objection, the judgment is not erroneous. *Rennet v. Bank of Columbia*, 9 W. 581 . . . .vi. 195.

5. A custom of all the banks in the District of Columbia, to demand payment and give notice to indorsers of negotiable paper on the fourth day of grace, which began upwards of twenty years ago, and has been uniformly practised on, and which was known to and well understood by the defendant when he indorsed the note in question, is to be considered as entering into the contract, and a demand and notice on the fourth day of grace were sufficient to charge him. *Ib.*

6. When a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment on the fourth day of grace, the parties are bound by that usage, being presumed to agree to be bound by it, though they do not in fact know it. *Mills v. Bank of the United States*, 11 W. 431 . . . .vi. 652.

7. Evidence of a usage between landlord and tenant to remove buildings erected by the latter, is admissible. *Van Ness v. Pacard*, 2 P. 137 . . . .viii. 52.

AGENT, E. 1 ; BILLS, &c. E. 18.

## USES.

TRUSTS, A. 1 ; WILL, D. 3.

There is no privity of estate between a feoffee to uses and the *cestuis que use* ; and the latter does not claim under or through the former, within the meaning of the act of South Carolina, of 1744, which allows two years in which to bring a suit, &c. *Henderson v. Griffin*, 5 P. 151 . . . .ix. 260.

## USURY.

CONTRACT, F.

## VARIANCE.

EVIDENCE, C. 2, 4 ; PLEADING, D.

## VENDOR AND PURCHASER.

FRAUDS ON PURCHASERS ; SPECIFIC PERFORMANCE AND RESCISSION.

A. OF THE AGREEMENT, AND HEREIN OF RESALE AND RESCISSION, 579.

**B. LIEN AND OTHER RIGHTS OF THE VENDOR, AND THE APPLICATION OF THE PURCHASE-MONEY, 579.**

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**D. STATUTE OF FRAUDS, 582.**

**E. OBJECTIONS TO TITLE, 583.**

**A OF THE AGREEMENT, AND HEREIN OF RESALE AND RESCISION.**

1. A conveyance to trustees, in trust to sell the land, and apply so much of the proceeds as may be needful to pay a debt, is not a purchase of the land by the creditor. *Neilson v. Lagow*, 12 H. 98....xix. 46.

2. A stipulation in a contract of sale of land, that if the purchaser fail to comply with the terms of sale within thirty days, the land shall then be sold for account of the purchaser, gives him a right to such resale, and if not made, no action for damages lies against him. *Webster v. Hoban*, 7 C. 399....ii. 591.

3. A conveyance of land set aside, for fraudulent misrepresentations as to the quantity, value, and title. *Tyler v. Black*, 13 H. 230....xix. 469.

4. Where the defect in the vendor's title was not discovered till after the sale, and was then revealed to the vendee by the vendor, the vendee will not be allowed to obtain the true title, and then have the contract rescinded. *Galloway v. Finley*, 12 P. 264....xii. 724.

5. If the vendee under such a contract, gives notice he will not be bound by it, if the vendor does not pay the balance due on the account, and the vendor does not adopt the alternative tendered to him, the contract is not at an end. *Barry v. Coombe*, 1 P. 640....vii. 743.

6. If a person, who has obtained a survey upon a military land warrant under the commonwealth of Virginia for 2,000 acres, sell and transfer, for a valuable consideration, his right to the survey, and assign the plat and certificate to the purchaser, whereupon he obtains a patent for the land in his own name; and if, upon a resurvey, it appear that the grant conveys 2,700 acres, the vendor cannot in equity support a claim for the surplus, against the vendee. *Vowles v. Craig*, 8 C. 371....iii. 178.

AUCTION, 2; CONTRACT, D. 7, G. 1; FRAUD, A. 11.

**B. LIEN AND OTHER RIGHTS OF THE VENDOR, AND THE APPLICATION OF THE PURCHASE-MONEY.**

**WILL, D. 2.**

1. A settler, entitled to preëmption, sold his right, his vendee resold it, taking from the second vendee a contract in writing, to pay to the preëmptioner a sum of money as part of the price for which the preëmptioner had conveyed his right to the first vendee. Upon a bill in equity by the preëmptioner, to subject the land to the payment of this sum of money, *held*, 1. That the preëmptioner had a title, which was the subject of a sale. 2. That the second vendee

having gone into possession under his contract, which he never rescinded, and not having relinquished the possession, could not afterwards acquire a title from the government by proving a right of preëmption in his own name, and then insist that nothing was due on account of his purchase. 3. That the complainant had a lien on the land by virtue of the contract of the second with the first vendee. *Thredgill v. Pintard*, 12 H. 24....xix. 15.

2. A purchaser in possession under the vendor, who buys up a better outstanding title, cannot set it up to defeat the vendor's right to the purchase-money; he can only recoup what he has fairly paid. *Bush v. Marshall*, 6 H. 284....xvi. 684.

3. A vendee, who buys up a better title than that of his vendor, who has acted fairly, may be treated as a trustee for the vendor, and duly entitled to receive from the latter what was thus paid for the better title. *Galloway v. Finley*, 12 P. 264....xii. 724.

4. One who went into possession of a lot, under a contract with a person having an inchoate Spanish title, and agreeing to do what was needful on the part of the grantee to complete that title, for their joint benefit, could not, while thus in possession, purchase in and set up an outstanding title, to defeat that under which he had entered. What he thus purchased enured to their joint benefit. *Hallett v. Collins*, 10 H. 174....xviii. 349.

5. A vendor cannot enforce his lien for unpaid purchase-money, against trustees for creditors of the vendee to whom the land has been conveyed, without notice of the lien. *Bayley v. Greenleaf*, 7 W. 46....v. 214.

6. An express contract, that the lien shall be retained to a specified extent, is equivalent to a waiver of the lien to any greater extent. *Brown v. Gilman*, 4 W. 255....iv. 393.

7. Where the deed itself remains an escrow until the first payment is made, and is then delivered as the deed of the party, and the vendor consents to rely upon the negotiable notes of the purchaser, indorsed by third persons, for the residue of the purchase-money, this is such a separate security as extinguishes the lien. *Ib.*

8. It being a general custom on the sale of entries in a military tract, for the vendee to take his chance of a surplus or deficiency in quantity, the vendor must show a special contract in writing to entitle himself to such surplus. *Dunlap v. Dunlap*, 12 W. 574....vii. 367.

9. A purchaser, in possession of land, cannot be relieved by a court of equity from payment of the purchase-money, for defect of vendor's title, without fraud charged in the bill and proved. *Patton v. Taylor*, 7 H. 133....xvii. 67.

10. Where the purchase-money is to be reinvested upon trusts that require time and discretion, or the acts of sale and reinvestment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase-money. *Wormley v. Wormley*, 8 W. 421....v. 469.

### C. PROTECTION OF THE PURCHASER, AND HEREIN OF NOTICE.

#### JUDGMENTS, &c. B. 3.

1. A vendee of personal property may be relieved in equity from the payment of a just proportion of the purchase-money, if the vendor, who warranted

the title, has died insolvent, and under a decree of a court of equity the purchaser has been obliged to pay a sum of money to extinguish a paramount title to a part of the property. *Wanzer v. Truly*, 17 H. 584....xxi. 701.

2. A judgment against the vendee, for the entire purchase-money, in a suit against him as the garnishee of the vendor, does not deprive the vendee of his title to such relief; as between him and the judgment creditor, the vendee has the better equity. *Ib.*

3. A person employed solely by the grantor as a scrivener to draw the deed, is not the agent of the purchaser, and notice to him is not constructive notice to the purchaser. *Astor v. Wells*, 4 W. 466....iv. 446.

4. A *bonâ fide* purchaser for a valuable consideration, gets a good title under the law of Ohio, though the vendor made the conveyance to defraud a creditor, who was a prior mortgagee by an unrecorded mortgage. *Ib.*

5. The rule of equity which protects *bonâ fide* purchasers without notice, is not applicable to the case of purchasers of military land warrants under the laws of Virginia. *Kerr v. Watts*, 6 W. 550....v. 160.

6. Such purchasers are considered as affected with notice by the record of the entry, and also of the survey; and subsequent purchasers are considered as acquiring the interest of the person making the entry; so that purchasers under conflicting entries are considered as purchasing under distinct rights, in which case the rule, as to innocent purchasers, does not apply. *Ib.*

7. But wherever the purchaser is affected with notice of the facts, which in law constitute the breach of trust, the sale is void as to him; and a mere general denial of all knowledge of fraud will not avail him, if the transaction is such as a court of equity cannot sanction. *Wormley v. Wormley*, 8 W. 421....v. 469.

8. A *bonâ fide* purchaser, without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase-money is actually paid. *Ib.*

9. Purchasers with notice, who have made improvements on land mortgaged, are not entitled to have their value deducted from the proceeds of the sale; nor can they insist that the debt should be apportioned upon all the purchased lands, the right of the mortgagee being to have the whole sold for the payment of the entire debt. *Hughes v. Edwards*, 9 W. 489....vi. 146.

10. The rule which protects *bonâ fide* purchasers does not apply to purchasers of merely equitable titles. *Hallett v. Collins*, 10 H. 174....xviii. 349.

11. An assignee in trust for the benefit of creditors is not a purchaser for valuable consideration. *Clements v. Berry*, 11 H. 398....xviii. 660.

12. Whether a purchase at a sheriff's sale to pay a precedent debt, no money being advanced, made the creditor a *bonâ fide* purchaser for a valuable consideration, so as to be entitled to protection in equity, the court was equally divided in opinion. *Benton v. Woolsey*, 12 P. 27....xii. 616.

13. What a defendant in equity must aver and prove to entitle himself to protection as a *bonâ fide* purchaser. *Boone v. Chiles*, 10 P. 177....xii. 63.

14. A defence of *bonâ fide* purchase, &c. held bad, because the purchasers had sufficient notice to put them on inquiry. *Caldwell v. Carrington's Heirs*, 9 P. 86....xi. 294.

15. A suit not prosecuted to judgment is not constructive notice of a claim

to a person who did not purchase *pendente lite*. *Alexander v. Pendleton*, 8 C. 462 . . . .iii. 221.

16. Tenants in possession under one who is a constructive trustee by reason of a fraud, but who are not averred to have had any notice of the fraud, cannot be ousted by a court of equity. *Ringo v. Binns*, 10 P. 269 . . . .xii. 115.

17. Notice of facts sufficient to put a party on inquiry, is not necessarily notice of what he might learn by inquiry. It does not so operate when he had a right to rely on positive assurances of the vendor, and so was not bound to inquire. *Boyce's Executors v. Grundy*, 8 P. 210 . . . .viii. 377.

18. The protection extended by a court of equity to a *bond fide* purchaser, belongs only to the purchaser of the legal title without notice of an outstanding equity. He who purchases no legal title cannot have this protection. *Vattier v. Hinde*, 7 P. 252 . . . .x. 469.

19. In the sales of lots, in the city of Washington, the lots are not chargeable for their proportion of the internal alley laid out for the common benefit of those lots; although the practice so to charge them has been heretofore universally acquiesced in by purchasers; and if a purchaser has acquiesced in that practice and has received a conveyance accordingly, without objection, yet he does not thereby acquire a fee-simple in such proportion of the alley, and may, in equity, recover back the purchase-money which he has paid therefor. *Pratt v. Law, Law v. Pratt, Pratt v. Duncanson, Campbell v. Pratt*, 9 C. 456 . . . .iii. 428.

20. A party, put by the circumstances on inquiry as to a fact, is affected with constructive notice thereof. *Oliver v. Piatt*, 8 H. 333 . . . .xv. 479.

21. Part performance by the vendee, and acquiescence by the vendor, prevent the latter from putting an end to the contract at his mere will. *Taylor v. Longworth*, 14 P. 172 . . . .xiii. 414.

22. If the vendor was to convey and be paid afterwards, and he failed to convey, he is to be treated as a mortgagee, so far as lapse of time is concerned, and cannot avoid the contract because the vendee did not pay on the day. *Ib.*

23. The rule that the vendee must prepare and tender the conveyance, appears not to exist in Ohio. *Ib.*

24. The purchaser of an equitable interest takes subject to every existing equity. *Shirras v. Caig*, 7 C. 34 . . . .ii. 447.

25. He who has equal equity, may acquire the legal estate, if he can, so as to protect his equity. *Fitzsimmons v. Ogden*, 7 C. 2 . . . .ii. 432.

ASSIGNMENT FOR BENEFIT OF CREDITORS, 5; DAMAGES, 6, 7; ESTOPPEL, C. 7; EXECUTORS, &c. D. 4; PARTITION, 3, 4.

#### D. STATUTE OF FRAUDS.

1. A promise to pay a sum of money, in consideration of the release of an equitable title is within the statute of frauds. *Hughes v. Moore*, 7 C. 176 . . . .ii. 506.

2. An item inserted in an account stated and settled, in the handwriting of the vendor, and signed by the vendee, in the words and figures following: "By my purchase of your half E. B. wharf and premises, this day agreed on between us, \$7.578.63," is a sufficient memorandum within the statute of frauds, and

parol evidence is admissible to fill up the initials. *Barry v. Coombe*, 1 P. 640 . . . .vii. 743.

### E. OBJECTIONS TO TITLE.

1. A contract to sell to a third person three years previous, which has manifestly been abandoned by him, so that he could not compel a specific performance, is not a valid objection to a title. *Greenleaf v. Queen*, 1 P. 138 . . . .vii. 499.

2. Nor is a claim for dower, if the purchaser knew or had the means of knowing its existence, and was aware he was purchasing of a trustee. *Ib.*

3. Though a trustee to sell must, as against his *cestuis que trust*, pursue the mode of sale specified in the deed of trust, yet a purchaser cannot object to the title upon the ground of a departure from that mode, if the *cestuis que trust* have sanctioned it. *Ib.*

## VERDICT.

### ISSUES ; JEOPAILS ; PLEADING, G.

1. Upon a special verdict, the court cannot intend any substantive fact not found, though the record contains sufficient evidence to warrant the jury in finding it ; and if the verdict is so imperfect that the court cannot decide the questions of law on which the opinions of the judges were opposed, the cause must be remanded, and a *venire de novo* awarded. *Barnes v. Williams*, 11 W. 415 . . . .vi. 645.

2. A verdict conditioned to be for the plaintiff, or defendant, as the court should be of opinion for one or the other party upon the effect of a certain deed, but not identifying the deed, is insufficient to support a judgment. *M'Arthur v. Porter*, 1 P. 626 . . . .vii. 735.

3. A verdict "for the defendants, subject to the opinion of the court upon the points reserved," does not authorize an absolute judgment for the defendants, unless the points reserved and the opinion of the court thereon, are stated on the record. *Smith v. Delaware Ins. Co.* 7 C. 434 . . . .ii. 605.

4. A verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue ; and, though the court may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. *Patterson v. United States*, 2 W. 221 . . . .iv. 88.

5. A verdict, certain to a common intent, is sufficient to sustain a judgment. *Liter v. Green*, 2 W. 306 . . . .iv. 113.

6. A special verdict which does not find the facts, but only the evidence of them, is imperfect, no judgment can be rendered thereon, and a *venire de novo* must be awarded. *Prentice v. Zane's Administrator*, 8 H. 470 . . . .xvii. 661.

7. A verdict, on which there was no judgment, is not an estoppel. *Reed v. Proprietors of Locks and Canals*, 8 H. 274 . . . .xvii. 585.

8. A verdict in a suit to try the title to slaves, which merely finds "for the



plaintiff \$1,200, the value of the four negroes in suit," will not warrant a judgment. *Bennett v. Butterworth*, 11 H. 669....xviii. 757.

9. In an action on a promissory note and an account stated, the general issue, the statute of limitations, and payment, being pleaded and issue joined, a verdict, "we of the jury find for the defendant upon the issues joined, as to the within note of \$456, and the within account"—*Held*, sufficient on error. *Downey v. Hicks*, 14 H. 240....xx. 156.

10. To a declaration in debt against the sheriff, averring, among other things, that the sheriff suffered and permitted the debtor in execution to escape and go at large, &c.; the defendant pleaded that he did not owe the debt, &c. The jury found that he did owe the said debt, in the declaration mentioned, in manner and form, &c. *Held*, that the plea put in issue every traversable fact, and the verdict must be taken to find each of them for the plaintiff; and that it satisfied the requirement of the statute of Mississippi, that, in such an action, the jury must find the debtor escaped, with the consent or through the negligence of the sheriff, in order to charge him. *Long v. Palmer*, 16 P. 65...xiv. 186.

## VISIT AND SEARCH.

LAW OF NATIONS, C. D.

## VIS MAJOR.

EVIDENCE, B.

1. A question of fact under the non-importation laws. Defence set up on the plea of distress, repelled. Condemnation. *The Aeolus*, 3 W. 392....iv. 286.

2. Libel under the non-intercourse acts. Alleged excuse of distress repelled. Condemnation pronounced. *The New York*, 3 W. 59....iv. 164.

EMBARGO, A. 23, 24.

## VOID AND VOIDABLE.

DEED, A. 12; EXECUTIONS, B.; INFANCY, 4-7; JUDGMENTS, &c. A. 8, 13; JURISDICTION, H. I.; STATUTES, C. 12.

## VOLUNTARY ASSOCIATION.

Where the members of an association agree to vest the legal title to their property in managers and trustees, to be held and managed pursuant to certain

articles, by one of which it is stipulated that each member should have a comfortable support during his life, but each renounced all individual ownership; *held*, upon the facts and agreements in the case, that the heirs of a deceased member, who, during his life, continued to be a member of the association, and to receive its benefits, had no title. *Goesels v. Bimeler*, 14 H. 589 . . . .xx. 357.

## WAGER OF LAW.

DEBT, C.

## WAIVER.

ADMIRALTY, C. a. 2, 5, b. 4; BILLS, &amp;c. F. 5, G. 4; ERROR, F.

1. The omission of the defendant to join in a demurrer to a plea, is a waiver of that plea. *Morsell v. Hall*, 13 H. 212 . . . .xix. 464.

2. Though judgment has been rendered on a demurrer, withdrawing it, and going to issue, waives it. *United States v. Boyd*, 5 H. 29 . . . .xvi. 290.

3. If a release of a witness be given in evidence without exception for want of proof of execution, that objection is waived. *Downey v. Hicks*, 14 H. 240 . . . .xx. 156.

4. A claim in reconvention in Louisiana, made after an exception to the jurisdiction, and on condition it be overruled, does not waive the exception. *Peale v. Phipps*, 14 H. 368 . . . .xx. 228.

APPEAL, A. 12, E. 3, 4; ERROR, F. 16; GUARANTEE, D. 5.

## WARRANT AND COMMITMENT.

ARREST; HABEAS CORPUS.

1. A warrant of commitment held illegal, because it did not state some good cause certain supported by oath. *Ex parte Burford*, 3 C. 448 . . . .i. 638.

2. An affidavit made before one magistrate may justify a commitment by another. *Ex parte Bollman*, *Ex parte Swartwout*, 4 C. 75 . . . .ii. 28.

## WARRANTY.

COVENANT, B.; ESTOPPEL, A.; SALE, B.

## WASTE.

UNITED STATES, A. 10.

## WAY.

## DEDICATION.

1. Where the soil of a way did not pass as included in the description by metes and bounds, it was held that it could not pass under the term appurtenances. *Harris v. Elliott*, 10 P. 25....xii. 7.

2. A special law, designed to protect the doings of commissioners in laying out certain streets in a town, was held not to bar an action by the owner of the soil upon a discontinuance of the way. *Ib.*

3. In Massachusetts, when land is taken for a public way, only an easement is acquired, the soil and freehold remaining in the private owner. *Ib.*

4. The act of Rhode Island, which requires towns to keep highways, &c. in repair, &c. applies to the sidewalks of cities, and to obstructions occasioned by snow and ice thereon; and it is a question for the jury, whether, having regard to the amount and kind of use of the way, it was reasonably safe and convenient. *City of Providence v. Olapp*, 17 H. 161....xxi. 429.

## WILL.

## CONVERSION.

## A. PROBATE AND LETTERS TESTAMENTARY, 587.

1. FOREIGN WILLS.
2. WHEN NECESSARY AND HOW OBTAINED.
3. EFFECT OF.
4. JURISDICTION AS TO.

## B. WHEN WILL TAKES EFFECT, 588.

## C. WHO MAY MAKE A BEQUEST OR DÉVISE, AND OF WHAT, 588

## D. CONSTRUCTION, 588.

1. AS TO QUANTITY AND KIND OF ESTATE.
2. MARSHALLING ASSETS AND CHARGES ON LAND.
3. EXECUTORY DEVISES AND CONTINGENT AND OTHER REMAINDERS  
AND THE VESTING OF INTERESTS AND ESTATES.
4. PARTICULAR WORDS AND PHRASES.
5. CONDITIONS, AND WHETHER PRECEDENT OR SUBSEQUENT.
6. SPECIFIC DEVISES AND BEQUESTS.

## E. REVOCATION, 592.

## A. PROBATE AND LETTERS TESTAMENTARY.

## 1. FOREIGN WILLS.

## CONFLICT OF LAWS, O.

## 2. WHEN NECESSARY AND HOW OBTAINED.

1. The statute of Ohio allowing wills, executed in other States, to be recorded, &c. there, cannot aid a will not so recorded, though the record does not show that the copy of the will was objected to in the court below. *Kerr v. Moon's Devisees*, 9 W. 565 . . . .vi. 187.

2. It is not necessary that an executor of a will, made in Virginia, devising to the executor land in Kentucky, should take out letters testamentary in Kentucky, to enable him to maintain an ejectment for the land in Kentucky. *Doe v. M'Farland*, 9 C. 151 . . . .iii. 302.

3. Though the statute of Kentucky requires two subscribing witnesses to a will of lands, the evidence of one may prove the will. *Davis v. Mason*, 1 P. 508 . . . .vii. 679.

## CONFLICT OF LAWS, E. 7, O. 1.

## 3. EFFECT OF.

1. Both under the local law of Louisiana and the chancery law as administered in the courts of the United States, when a will has been admitted to probate, a claim that it was revoked by a subsequent will, and that the latter alone is operative, cannot be made, effectually, so as to set up a title under the latter will, save in a court of probate. *Gaines v. Chew*, 2 H. 619 . . . .xv. 236.

2. Perhaps under some circumstances equity may interpose to compel a party to allow the revocation of a probate and the substitution of another will by the court of probate. *Ib.*

3. But in Louisiana, in an action to try a title to land, the probate of a will may be drawn in question collaterally, by an heir at law, and if the parties are numerous and the controversy complicated, and discovery is wanted and can be had, equity would give relief, especially in a case of fraud. *Ib.*

4. Neither by the law of Maryland, nor by that of Tennessee, was a probate of a will made evidence on the question *devisavit vel non*; and, therefore, a will having been probated in Maryland, and offered in evidence in Tennessee, the question concerning full faith being given to records, &c., under the constitution, did not arise. *Darby's Lessee v. Mayer*, 10 W. 465 . . . .vi. 480.

## REGISTRATION.

## 4. JURISDICTION AS TO.

APPEAL, A. 9; *Supra*, A. 3.

## B. WHEN WILL TAKES EFFECT.

1. Under the statute of Virginia, respecting wills, it is necessary (in order that lands acquired after the date of the will may pass by the will) that the intention of the testator should clearly appear upon the face of the will to that effect. *Smith v. Edrington*, 8 C. 66....iii. 27.

2. The statute of Maryland, passed in 1850, concerning the effect of wills upon after-acquired lands, did not apply to a will executed before the first day of June, 1850, the testator having survived until after that day. *Carroll v. Carroll's Lessee*, 16 H. 275....xxi. 128.

## C. WHO MAY MAKE A BEQUEST OR DEVISE, AND OF WHAT.

1. By the law of New York, a right of entry is devisable, and also passes to trustees of an absconding debtor for the benefit of his creditors. But there is a resulting trust in favor of the debtor, when his debts are all paid. *Ingles v. Trustees of the Sailor's Snug Harbor*, 3 P. 99....viii. 305.

2. A possession of land taken and held under an execution, not against the lawful owner, does not prevent him from devising the land under the law of New York. *Waring v. Jackson*, 1 P. 570....vii. 702.

## D. CONSTRUCTION.

## 1. AS TO QUANTITY AND KIND OF ESTATE.

1. A devise of "all the estate called M., lying in H. county, containing by estimation 2,585 acres, also one other tract called H. P., containing by estimation, &c., also one other tract, containing, &c., called P. F.," carries a fee in the first-mentioned lands, without words of limitation. *Lambert's Lessee v. Paine*, 3 C. 97....i. 535.

2. Where there are no words of limitation to a devise, it passes only an estate for life, unless a plain intention to give a larger estate is manifested. *Wright v. Denn*, 10 W. 204....vi. 382.

3. The introductory clause, declaring an intention to dispose of all the testator's property, does not *per se* enlarge a devise; it may assist in ascertaining the intention. *Ib.*

4. If a charge be merely on the land devised, it does not imply the devise of a fee. *Ib.*

5. "All the rest of my lands" do not, of themselves, import a devise of the fee; unless aided by the context, the devisee, whether specific or residuary, will take only a life-estate. *Ib.*

6. The words, "all the rest of my lands and tenements, in possession, reversion, and remainder," were held in this will not to be capable of any definite legal signification in reference to the quantity of the estate devised. *Ib.*

7. The condition, "provided she has no lawful issue," annexed to a devise to the testator's widow, does not give a fee. *Ib.*

8. A devise of "all my lands, freely to be possessed and enjoyed," does not, unaided, carry a fee. *Ib.*

9. A devise to E. M. during his natural life, and in case he should have heirs lawfully begotten of him, then to him, his heirs and assigns ; but if he should die without such an heir, the land to be sold, &c., gives to E. M. only an estate for life, to be enlarged into a fee on the happening of the contingency, according to the laws of Maryland. *Shriver's Lessee v. Lynn*, 2 H. 43 . . . .xv. 25.

CHARITY, A. 4; EVIDENCE, F. 13.

## 2. MARSHALLING ASSETS AND CHARGES ON LAND.

1. Though a will charging debts on the testator's "estate" may subject his lands to their payment, yet, if the context shows the testator referred only to his personalty by the word estate, the lands are not charged. *Archer v. Deneale*, 1 P. 585 . . . .vii. 711.

2. In Maryland, a testator may charge his real estate with the payment of his debts, to make the manumission of his slaves effective, without prejudice to his creditors, and the words, "and after my debts and funeral charges are paid, I devise as follows," amount to such a charge. *Fenwick v. Chapman*, 9 P. 461 . . . .xi. 428.

3. A disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of his creditors, operates to create a charge of his debts on his real estate, though no such charge is made in words by the will ; and the executor may be compelled by the creditors to execute the trust. *Bank of the United States v. Beverly*, 1 H. 134 . . . .xiv. 533.

4. Whether a legacy is chargeable on real estate depends on the will of the testator, and if he has blended his realty and personalty into one fund, for this purpose, it is not necessary first to exhaust the personalty before resorting to the realty. *Lewis v. Darling*, 16 H. 1 . . . .xxi. 1.

5. A devise of a tract of land to A, "he paying all my debts," charges the debts on the land, and gives the other devisees and legatees a right to maintain a bill to have the debts paid thereout. The creditors need not be made parties. *Potter v. Gardner*, 12 W. 498 . . . .vii. 311.

6. A purchaser from the devisee may be charged for the purchase-money remaining in his hands, and for what he has aided the devisee in misapplying. *Id.*

## 3. EXECUTORY DEVISES AND CONTINGENT AND OTHER REMAINDERS, AND THE VESTING OF INTERESTS AND ESTATES.

1. A testator devised to the chancellor of the State of New York, the mayor and recorder of the city of New York, and several other persons, by their official description only, and their respective successors in office, in trust to build, &c. a hospital, adding, if this cannot legally be done by them without an act of the legislature, they should apply for an act of incorporation, and that at all events his estate should be held, if by an heir, charged with the said trusts. *Held*, 1. That the devise might be construed to vest the fee in the individual persons holding those offices. *Inglis v. Trustees of the Sailor's Snug Harbor*, 3 P. 99 . . . .viii. 305.

2. But if not, it was a good executory devise *in futuro* to the corporation, when it came into existence. *Ib.*

3. That in the hands of the heir, the lands were charged by the will with the trusts. *Ib.*

4. A devise to A. "should he become a citizen of the United States, or be otherwise qualified to hold real estate before his death," is a good executory devise, depending on a contingency not too remote. *Beard v. Rowan*, 9 P. 301....xi. 367.

5. A devise to A in fee, and if he shall die under the age of twenty-one years, and without issue, then to B in fee, is a good executory devise; and if B die before the contingency happen, it devolves upon his heir, and so from heir to heir until the contingency happen, when it vests absolutely in him only who can then make himself heir to B the executory devisee. And although A be the heir at law of B, yet the executory devise thus devolving on him, is not merged in the precedent estate, but on the death of A devolves to the next heir of B. *Barnitz's Lessee v. Casey*, 7 C. 456....ii. 618.

6. Construction of a will; legacy vested and payable from a specific fund. *Pray v. Belt*, 1 P. 670....vii. 760.

7. Under a devise to two sons in fee, with a clause that if either die without issue, the survivor should take his part, and if both die without issue, then over—*Held*, that, under the law of New York, nothing passed by this last limitation over. *Waring v. Jackson*, 1 P. 570....vii. 702.

8. In New York, a devise over to a survivor on failure of issue is deemed to be on a definite and not an indefinite failure of issue, and so is good by way of executory devise, and does not create an estate tail by implication, but a fee-simple, defeasible by death without issue in the lifetime of the survivor. *Jackson v. Chew*, 12 W. 153....vii. 94.

9. An absolute bequest of certain slaves to P. H. is qualified by a subsequent limitation over, that if either of the testator's grandchildren, P. H. or J. D. A., should die without a lawful heir of their bodies, that the other should heir its estate, which converted the previous estate into an estate tail; and there being no words in the will which restrained the dying without issue to the time of the death of the legatee, the limitation over was held to be on a contingency too remote. *Williamson v. Daniel*, 12 W. 568....vii. 362.

10. Bequest to the testator's wife of all his personal estate, "to and for her own use, benefit, and disposal, absolutely; the remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin," the son of the testator—*Held*, the bequest to the son cut down the interest of the wife to a life-estate, and the son took a vested remainder. *Smith v. Bell*, 6 P. 68....x. 29.

11. A devise to trustees and their heirs, to and for certain uses and in trust to preserve contingent remainders, gives legal estates to the *cestuis que use*, unless the performance of some duty by the trustees requires them to retain the legal estate. *Webster v. Cooper*, 14 H. 488....xx. 296.

12. A devise to A for life, remainder to her sons, as tenants in common, and to the heirs of their bodies, does not give an estate tail to A under the rule in Shelly's case; for the two sons cannot take an estate tail by descent from their mother, and must take as purchasers, if at all. *Ib.*



## 4. PARTICULAR WORDS AND PHRASES.

1. A testator, after having made provision for his wife and sons, and directed his executors to lay off a portion of his lands into lots for the site of a town, declares: "I wish my executors to remember that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs." The words "for the use," &c. appeared to have been interlined. *Held*, that sales were directed of all the lots, and not merely of enough to pay debts. *Lane v. Vick*, 3 H. 464 . . . .xv. 514.

2. A declaration in a will that the testator is about to go on a journey, and therefore thinks it advisable to make a will, is only an assignment of a reason for then making the will, and does not render the will conditional. *Tarver v. Tarver*, 9 P. 174. . . .xi. 323.

3. A bequest "of all my effects" may be so controlled by the associated words, the contents of the will, and the surrounding circumstances, as not to have their full natural effect. *Ennis v. Smith*, 14 H. 400 . . . .xx. 251.

4. The words "residuary legatee" may carry the real estate, where such can be made out, from other parts of the will, to have been the testator's intention. *Burwell v. Mandeville's Executor*, 2 H. 560 . . . .xv. 203.

5. Bequest to a daughter, to be delivered to her when she arrives at the age of eighteen years; but if she should die under that age, leaving no heir of her body, then over; she married at the age of sixteen. *Held*, that the husband could take nothing by his marital right till the wife arrived at the age of eighteen. *Price v. Sessions*, 3 H. 624 . . . .xv. 569.

6. J. B. devises all his real estate to the testator's son, J. B., jun., and his heirs lawfully begotten; and in case of his death without such issue, he orders A. Y., his executors and administrators, to sell the real estate within two years after the son's death; and he bequeathes the proceeds thereof to his brothers and sisters, by name, and their heirs forever, or such of them as shall be living at the death of the son, to be divided between them in equal proportions, share and share alike. All the brothers and sisters die, leaving issue. Then A. Y. dies, and afterwards J. B., jun., the son, dies without issue. Heirs is a word of limitation; and none of the testator's brothers and sisters being alive at the death of J. B., jun., the devise to them failed to take effect. *Daly v. James*, 8 W. 495 . . . .v. 494.

7. Devise of the testator's estate: "One fourth part to be given to the families of G. Holloway, W. B. Blackburn, and A. Bartlett, to those of their children that my wife shall think proper, but in a greater proportion to F. P. Holloway than to any other of G. Holloway's children; to E. P. Bartlett in a greater proportion than any of A. Bartlett's children. The balance to be given to the families of C. and J. T. Griffin's children, in equal proportion." *Held*, that the children of C. and J. T. Griffin took *per stirpes*, and not *per capita*, and that the property devised to them was to be divided into two equal parts, one moiety to be assigned to each family. *Walker v. Griffin's Heirs*, 11 W. 375 . . . .vi. 629.

## 5. CONDITIONS, AND WHETHER PRECEDENT OR SUBSEQUENT.

1. Devise to two grandchildren of the testator, provided, that if both shall die under age and without lawful issue, then over. *Held*, that, as the devisees lived to be of full age, the devise over never took effect. *Doe v. Watson*, 8 H. 263 . . . .xvii. 581.

2. A devise of an estate tail upon the conditions that the devisee would take the name of the devisor, and also take an oath, &c., were held, upon the particular provisions of the will, to be conditions subsequent. *Taylor v. Mason*, 9 W. 325 . . . .vi. 73.

3. A testator devised as follows: "In case of having no children, I then leave and bequeathe all my real estate, at the death of my wife, to William King son of brother James King, on condition of his marrying a daughter of William Trigg, and my niece Rachel, his wife, late Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeathe said estate to any child, giving preference to age, of William and Rachel Trigg, that will marry a child of my brother James King's, or of sister Elizabeth's wife of John Mitchell, and to their issue." *Held*, 1. That the condition on which the testator devised to William King was a condition subsequent. *Finley v. King's Lessee*, 3 P. 346 . . . .viii. 438.

4. That the lands not devised to the wife of the testator vested in possession on his death. *Ib.*

5. That in an action at law the question could not be determined upon what trust, if any, William King took. *Ib.*

## 6. SPECIFIC DEVISES AND BEQUESTS.

1. A specific devise to a wife of one third part of the testator's real estate for life, remainder to his son, followed by specific devises to the son and to other persons, is not to be satisfied out of that devised to the son, to the exclusion of that devised to others. *Walker v. Parker*. 13 P. 166 . . . .xiii. 108.

2. A devise of "the balance of my real estate, believed to be and consist in lots numbered six," &c., (describing them,) is a specific devise. *Ib.*

3. A direction in a will, that if the estate shall not be sufficient to pay certain specific legacies and annuities they shall not abate in proportion, but the deficiency shall be deducted from a certain legacy given to the residuary devisee and legatee, applies to deficiencies arising from losses after the death of the testator. *Silsby v. Young*, 3 C. 250 . . . .i. 571.

## E. REVOCATION.

1. A contract by a testator, after making his will, to lease land for ninety-nine years, reserving a ground rent, with the right to the lessee to extinguish the reversion by payment of a fixed sum, works such a change of interest as revokes the devise. *Bosley v. Bosley's Executrix*, 14 H. 390 . . . .xx. 246.

2. Whether a residuary clause passes land the specific devise whereof was revoked by a change of interest by act of the testator after the date of his will is a question of intent, to be decided, in each case, upon its own circumstances. *Ib.*

## WITNESS.

## EVIDENCE, I.

## WRIT OF ERROR.

ERROR; EXCEPTIONS; JURISDICTION, A. b. c. 3; PRACTICE, I. E.

## WRIT OF RIGHT.

1. Several tenants, claiming distinct parcels of land, by different titles, cannot be joined in a writ of right. *Green v. Liter*, 8 C. 229 . . . .iii. 104.

2. Under the act of Virginia, reforming proceedings on writs of right, no common-law plea in abatement is abolished, nor is the tenant precluded from pleading specially in bar. *Ib.*

3. A seisin in deed, in contradistinction to a seisin in law, is necessary to maintain a writ of right; but such a seisin may exist, in intendment of law, without an actual entry, on taking esplees. *Ib.*

4. A better outstanding title in a third person, is not a defence in a writ of right. *Ib.*

5. Joining the *mise* in a writ of right, is an admission that the defendants are, jointly, tenants of the whole freehold. *Ib.*

6. A writ of right brings into comparison the titles of the parties to the writ; the question is, which of those two parties has the better right to the land. *Green v. Watkins*, 7 W. 27 . . . .v. 205.

7. Though a mere outstanding title in a third person, consistent with all the facts necessary to constitute the demandant's case, cannot be shown to defeat his action, yet if the existence of that title is inconsistent with any fact necessary to be proved by the demandant to maintain his title, as against the tenant, it may be shown by him. *Ib.*

8. Thus, as seisin in fact by the demandant is essential, if he relies merely on a patent to prove such seisin, it may be disproved by showing an earlier patent to a third person. *Ib.*

9. *Green v. Liter*, 8 C. 299, explained. *Ib.*

10. In a writ of right, brought under the statute of Kentucky, where the demandant described his lands by metes and bounds, and counted against the tenants jointly; it was held that it was matter pleadable in abatement only that the tenants held severally, and that, by pleading in bar, they admitted their joint seisin, and lost the opportunity of pleading a several tenancy. *Liter v. Green*, 2 W. 306 . . . .iv. 113.

11. The tenants could not, in this case, severally plead, in addition to the *mise*, or general issue, that neither the plaintiff, nor his ancestor, nor any other under or from whom he derived his title to the demanded premises, were ever

actually seised or possessed thereof, or of any part thereof; because it amounted to the general issue. *Ib.*

12. A joint judgment against the tenants for the costs, as well as the land, was correct. *Ib.*

13. Under a writ of right, the tenant may show title in a stranger. *Inglis v. Trustees of the Sailor's Snug Harbor*, 3 P. 99 . . . .viii. 305.

14. The demandant in a writ of right may recover an undivided part of the land, though he has demanded the whole in his count. *Ib.*

15. The revised statutes of Massachusetts, which abolished writs of right, did not prevent such writs from being brought in the circuit court of the United States, if the seisin of the demandant was within the limitation of time allowed by the laws of that State for the recovery of land. *Homer v. Brown*, 16 H. 354 . . . .xxi. 182.

ERROR, I 28.

## APPENDIX.

**PRACTICAL DIRECTIONS FOR SUING OUT AND PROSECUTING WRITS OF ERROR AND APPEALS TO THE SUPREME COURT OF THE UNITED STATES.**

## I. Writs of Error to State Courts.

THE cases, in which such writs may be used, are described in the 25th section of the judiciary act of September 24, 1789, (1 Stats. at Large, 85.) Each particular contained in this section, has been the subject of elaborate and repeated examinations in the numerous decisions made thereon. They will be found digested in this work under the title, Jurisdiction, A. c. Such a writ of error may be sued out, either from the supreme court of the United States, or from a circuit court of the United States, by virtue of the 9th section of the act of May 8, 1792, (1 Stats. at Large, 278.) Under the authority of this law, the form of a writ of error was devised by the judges of the supreme court of the United States, and transmitted to the clerks of the circuit courts; and it may issue from the office of a clerk of a circuit court of the United States, as well to remove records of state courts, as of courts of the United States. (*Buel v. Van Ness*, 8 W. 312, v. 428.)

**The writ is in the form following:—**

UNITED STATES OF AMERICA, ss:

*The President of the United States, To the Honorable the* **GREETING :**

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or

claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said as by complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington, on the Monday of next, in the said supreme court to be then and there held, that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable chief justice of the said supreme court, the of in the year of our Lord one thousand eight hundred and clerk of the supreme court of the United States,

or  
clerk of the circuit court of the United States, as  
the case may be.

Allowed by

The allowance of the writ may be made, and the citation signed by the chief justice, or judge, or chancellor of the court rendering, or passing the judgment or decree complained of, or by a justice of the supreme court of the United States.

To obtain the allowance of the writ and the signature of the citation, a petition should be drawn up, signed by the party or his attorney and addressed to the judge applied to, showing that a case exists for such a writ. This petition should describe the suit in the state court, show that the judgment or decree was rendered by the highest court in which a decision could be had, that the judgment or decree is final, in contradistinction to interlocutory, that there was drawn in question some one or more of the matters described in the 25th section of the judiciary act, that the decision of such highest court was adverse to the right, title, or exemption thus claimed by the petitioner, and that it so appears of record.

If the petitioner desires to have the writ of error operate as a *supersedeas*, and stay the execution of the judgment or decree, he must lodge a copy of the writ for the adverse party, in the clerk's office where the record remains, within ten days, Sundays excluded, after the entry of the judgment or decree. He must consequently apply for, and obtain the allowance of the writ within ten days; and as the judge, when the writ is applied for, and the citation signed within ten days, is required by law to take sufficient security that the plaintiff shall prosecute his writ to effect and answer all damages and costs, the petitioner must be prepared, on the presentation of his petition, to give security accordingly. This is given by a bond with surety or sureties, in a sufficient amount to cover the entire amount of damages, interest, and costs involved in the writ of error, and the judge who signs the citation passes on the sufficiency of the security.

The form of the bond is as follows :—

Know all men by these presents, that we,                    are held and firmly bound unto                    in the full and just sum of                    to be paid to the said                    certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this                    day of                    in the year of our Lord one thousand eight hundred and

Whereas lately at a                    in a suit depending in said court, between                    as rendered against the said                    and the said                    having obtained                    and filed a copy thereof in the clerk's office of the said court to reverse the                    in the aforesaid suit, and a citation directed to the said                    citing and admonishing to be and appear at a supreme court of the United States, to be holden at Washington, the                    Monday of                    next.

Now the condition of the above obligation is such, that if the said                    shall prosecute                    to effect, and answer all damages and costs if                    fail to make                    plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered }  
in presence of                    }  
Approved by

[SEAL.]  
[SEAL.]  
[SEAL.]

If the writ of error be not sued out within ten days, and consequently can not operate as a *supersedeas* of the execution, only security for the costs upon the writ of error need be given.

The forms of a citation and service are as follows :—

THE UNITED STATES OF AMERICA,  
GREETING:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at Washington on the                    Monday of                    next, pursuant to a writ of error, filed in the clerk's office of the                    wherein                    plaintiff in error, and you are defendant in error, to show cause, if any there be, why                    rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable                    of the                    this                    day of                    , in the year of our Lord one thousand eight hundred and

On this                    day of                    in the year of our Lord one thousand eight hundred and                    personally appeared                    before me, the subscriber, and makes oath that he delivered a true copy of the within citation to

The adverse party must have at least thirty days' notice by service of the citation. But this does not prevent a writ of error from issuing within thirty days of the term at which it is made returnable. It should be tested on the first day of the term next preceding the return term. But the adverse party is not bound to enter his appearance until the expiration of thirty days from the service of the citation. (Rule 16, February 7, 1803, *Welsh v. Mandeville*,



Cranch, 321, ii. 281.) Consequently, the citation may be made returnable in term, if necessary, and on such a day of the term as will enable the plaintiff in error to have it served on the adverse party thirty days before its return day. If this can be done thirty days before the first day of the next term, it should be made returnable on that day. It should bear date on the day when it is signed.

The plaintiff in error should deposit in the office of the court where the record of the judgment or decree remains, the original writ of error, the citation, with its service indorsed thereon, and the bond, together with a copy of each. The clerk of the court to which the writ of error is directed, makes his return by transmitting a true copy of the record without references *aliunde*, and of all the papers, exhibits, depositions, and other proceedings, authenticated by the seal of the court and the signature of the clerk. The original writ of error, the citation, with its service indorsed thereon, and a copy of the bond are appended to the return. A copy of the writ of error, of the citation, and the original bond remain in the office of the clerk making the return.

The entry of the writ in the supreme court and the proceedings thereon, are the same as in writs of error and appeals from the circuit courts of the United States, and reference may be had to the directions hereafter given, as to those proceedings.

## II. WRITS OF ERROR TO AND APPEALS FROM THE CIRCUIT COURTS OF THE UNITED STATES.

### I. *Writs of Error.*

The writ issues either from the office of the clerk of the supreme court of the United States, or from the office of a clerk of a circuit court of the United States.

It must be allowed and the citation signed by a justice of the supreme court, or a judge of the circuit court. The district judges being judges of the circuit court, are competent to allow writs of error and sign citations.

No petition setting forth a cause for the writ is ordinarily required, though the judge applied to must be satisfied that a writ of error should be allowed. In practice, his personal knowledge of the case is, ordinarily, sufficient.

The same rules respecting the time within which a copy of the writ must be filed in the clerk's office where the record is, to operate as a *supersedeas*, and the taking of a bond for the damages and costs, or for the costs only, in case the writ does not operate as a *supersedeas*, and the filing of the originals and copies in the clerk's office, and the service of the citation, and the teste and return days of the writ of error, and the date and return day of the citation, and the form of the citation, and the mode of making return of the writ of error, which are applicable to writs of error to state courts, are also applicable to writs of error to circuit courts. The acts of congress have made the former, in these particulars, identical with the latter.

The form of a writ of error to circuit courts is as follows :—

UNITED STATES OF AMERICA, ss:

*The President of the United States, To the Honorable the Judge of the  
Court of the United States for the District of* GREETING :

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, between a manifest error hath happened, to the great damage of the said as by complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington, on the Monday of next, in the said supreme court to be then and there held; that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable chief justice of the said supreme court, the of in the year of our Lord one thousand eight hundred and clerk of the supreme court of the United States.

Allowed by

The cases in which writs of error will lie to circuit courts may be found digested under the heads of, Error and Jurisdiction, A. d.

### *Appeals from Circuit Courts.*

An appeal may be taken from final decrees in cases in equity or admiralty where the amount in dispute exceeds the sum or value of two thousand dollars. The cases in which appeals lie, may be found digested under the heads of, Appeal and Jurisdiction, A. d.

If an appeal be claimed and allowed at the same term when the final decree appealed from is entered, no citation is necessary.

But the same rules respecting a bond on the allowance of the appeal, and the mode of certifying and authenticating a copy of the record to be transmitted to the supreme court, are applicable to appeals, as to writs of error.

If the appeal be not claimed and allowed at the same term when the final decree appealed from is entered, an application should be made by petition to some justice of the supreme court, or some judge of the circuit court, setting forth a case within the law allowing appeals, and praying therefor.

The judge, before signing the citation, which should be in form like that above given for writs of error, will require a bond as in case of writs of error.

The petition, if any, for and the allowance of the appeal, the citation, if any, with an indorsement of its service thereon, the bond, and copies of each, should be deposited in the office of the clerk where the record is; and copies of the petition for and allowance of the appeal and of the bond, and the original citation, if any, with its service indorsed thereon, should be appended to the record,

and transmitted therewith to the supreme court. The original petition for and allowance of the appeal and bond, and the copy of the citation, will remain in the office of the clerk whence the record is transmitted.

In several States, there is at present no circuit court of the United States; in lieu thereof a district court, with circuit court powers. In such cases, the judges of the district courts have the same powers respecting the allowance of writs of error and appeals from their own courts, and the signing of citations, and approval of bonds, as judges of the circuit courts; but not the same as the justices of the supreme court of the United States, as to the allowance of writs of error to state courts, or to courts other than those in which they respectively preside.

### THE TRANSMISSION OF TRANSCRIPTS OF THE RECORD AND ENTRY OF WRITS OF ERROR AND APPEALS IN THE SUPREME COURT.

A transcript of the record in error or appeal may be sent to the clerk of the supreme court at any time during the vacation, or in term, with directions to file the transcript and docket the cause; and he will do so, if a bond with competent security be filed, in the penal sum of \$200, conditioned to pay the costs.

The form of this bond may be as follows:—

Know all men by these presents, That we, \_\_\_\_\_ of \_\_\_\_\_ in the county of \_\_\_\_\_ and State of \_\_\_\_\_ and \_\_\_\_\_ of \_\_\_\_\_ in the county of \_\_\_\_\_ and State of \_\_\_\_\_ are held and firmly bound unto William Thomas Carroll, clerk of the supreme court of the United States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said William Thomas Carroll, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand eight hundred and \_\_\_\_\_

Whereas, lately at \_\_\_\_\_ in a suit depending in said court, between \_\_\_\_\_ as rendered against the said \_\_\_\_\_ and the said \_\_\_\_\_ having obtained \_\_\_\_\_ to remove the said cause to the supreme court of the United States, and filed \_\_\_\_\_ transcript of the record of said court in said cause in the office of the clerk of the supreme court of the United States, to reverse the \_\_\_\_\_ in the aforesaid suit:

Now the condition of the above obligation is such, That if the said obligors shall well and truly pay or cause to be paid to the said William Thomas Carroll, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said William Thomas Carroll, clerk as aforesaid, and charged to the said \_\_\_\_\_ in the prosecution of the said \_\_\_\_\_ then the above obligation to be void, otherwise to remain in full force and virtue.

[SEAL.]

Sealed and delivered in the presence of—

[SEAL.]

I,            of            the            court of the United States for the            district of            , do hereby certify, that the within named obligors are known to me to be perfectly good and responsible for the within named amount.

N. B. Insert the Post Offices (and, if in a city, the streets and numbers) of the sureties. The party (Plaintiff in Error or Appellant) should not join in the bond, as he is bound without it.

The plaintiff in error, or appellant, may, if he prefer, deposit the like sum of \$200, subject to the draft of the clerk, on account of the costs.

But when it is said this may be done at any time during the term, it must be understood to be subject to the following rule :—

1. "In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court within the first six days of the term ; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause, and file the record thereof with the clerk of this court within the first thirty days of the term ; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed.

And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court or the consent of the opposite party.

2. But the defendant in error or appellee may at his option docket the cause, and file a copy of the record with the clerk of the court ; and if the case is docketed, and a copy of the record filed with the clerk of this court by either party within the periods of time above limited and prescribed by this rule, the case shall stand for argument at the term.

3. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, and Utah."

The certificate required by this rule, as the foundation of a motion to docket and dismiss a cause, must give the names of all the parties, both plaintiff and defendant. A. B. and others *v.* C. D. and others, is not sufficient.









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